AUTHORITY AND DOMINION

Volume 3

AUTHORITY AND DOMINION

AN ECONOMIC COMMENTARY ON EXODUS

Volume 3
Part 3: Tools of Dominion

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POINT FIVE PRESS
Dallas, Georgia

Authority and Dominion: An Economic Commentary on Exodus, Volume 3
Part 3: Tools of Dominion
Previously titled: *Tools of Dominion: The Case Laws of Exodus*

Published by
Point Five Press
P.O. Box 2778
Dallas, Georgia 30132

Typesetting by Kyle Shepherd

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PREFACE

I write this Preface out of a sense of obligation. In the Table of Contents for *Tools of Dominion* (1990), there is this entry: Preface. In mid-2011, as I was proofreading the newly typeset Point Five Press edition, I noticed that there was no Preface in that book. The book went through its initial printing of either 3,000 or 5,000 copies. The Institute for Christian Economics published a second edition. I do not recall how many copies: at least 3,000. That was the only book in this commentary series, other than Genesis, that went into a second printing. In 21 years, no one mentioned that it was missing a Preface. This raises a question: How many people who bought it actually read it? Second, if the author did not notice, who should have noticed?

Tools of Dominion is the most intense of all of my commentaries. It covers mainly three chapters: Exodus: 21–23. The original edition filled 1,216 pages of text. The index was 70 pages long. It took me something in the range of 150 hours to compile it. I have never liked to index. That was the most burdensome index in my career. To say that there is a great deal of economic information in these three chapters is not an exaggeration.

A. The Main Issue

The main issue facing the Israelites at the time of the exodus was the conquest of Canaan. Would they or wouldn't they begin the conquest? They decided that they would not. This was the supreme issue of the Book of Numbers. Would they impose negative sanctions on the Canaanites? If not, God would impose negative sanctions on them: wandering. In Numbers 14, when the 12 spies returned, the nation decided that the 10 fearful spies were correct. The land was filled with giants. They tried to stone Joshua and Caleb, who rec-

ommended an immediate attack. God then brought a plague on the nation. They also would wander for another 38 years.

This had not taken place when God laid down the law: the Ten Commandments (Ex. 20) and the case laws that threw additional light on how these laws should be enforced (Ex. 21–23). The case laws would govern the nation when they took possession of the Promised Land.

The case laws are short and to the point. My exposition of them indicates how comprehensive they were. They condensed a great deal of economic information into a short text. They did not explain these economic principles. They covered slavery, judicial liability, judicial procedure, penalties on violence, penalties on sabbath violations, and penalties on theft.

There was no law that mandated tax-funded charity. There was no law that mandated wealth redistribution by civil law. There was nothing that could legitimately be used to justify the modern welfare state.

B. A Counterfeit Gospel

What was true of the case laws of Exodus was equally true of the laws of Leviticus and Deuteronomy. If the defenders of the so-called Social Gospel cared about the judicial texts of the Bible, they would either abandon the Social Gospel or else re-position the Social Gospel as having nothing to do with biblical law and biblical ethics. But they want to claim the prestige associated with the Old Testament in Bible-believing churches—where the money is—so they self-consciously argue two mutually exclusive positions: (1) the Mosaic economic laws do not carry over literally into the New Testament; (2) the ethical passion of the prophets is still binding in the New Testament, even though the specific Mosaic economic laws that the prophets called the nation to enforce are no longer binding. Then they present socialism, or the welfare state, or even Marxism (liberation theology) as the "true Christianity" that New Testament prophetic passion demands that Christians strive to implement. They baptize socialism in the name of the Old Testament prophets and Jesus.

This deception has gone on for over a century. It is morally corrupt. The Social Gospel is morally corrupt. There is nothing remotely biblical about the Social Gospel, whether we are discussing the early

twentieth-century version[1] or the early twenty-first-century version.[2] Those who promote such views are wolves in sheep's clothing.

They have not gained a wide hearing inside American fundamentalist churches. They have gained only marginally more support in evangelical Protestant churches. They have drawn support from a much higher percentage of Christian college professors in the humanities and social sciences than from laymen in the pews. This has been true for over a century. This is because Social Gospel economics is essentially left-wing Progressivism (1885–1920) or far-left Keynesianism (post-1960), which is what most Christian college professors were taught in their years of higher education. Laymen can spot a spiritual counterfeit far more readily than a college professor can. Laymen have not spent their adult years submitting to state-funded and state-accredited universities in order to earn their salaries.

With respect to the Social Gospel, I remind my readers: this, too, shall pass. Liberation theology did. It sank on board the rudderless ship *Karl Marx* in 1991. When the modern welfare states of the West finally go bankrupt or else default on their promises to elderly voters, there will be a great moral revulsion against the welfare state and its defenders. This will include the antinomian prophets of the Social Gospel movement. I would like to think that my efforts over the last 45 years, and perhaps for another decade, will have something to do with that revulsion when it at last engulfs the promoters of the messianic welfare state.

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1. C. Gregg Singer, *The Unholy Alliance: The Definitive History of the National Council of Churches and Its Leftist Policies—From 1908 to the Present* (New Rochelle, New York: Arlington House, 1975).

2. Joel McDurmon, *God Versus Socialism: A Biblical Critique of the New Social Gospel* (Powder Springs, Georgia: American Vision, 2009).

INTRODUCTION

> *This is he [Moses] that was in the church in the wilderness with the angel which spake to him in the mount Sinai, and with our fathers: who received the lively oracles to give unto us: To whom our fathers would not obey, but thrust him from them and in their hearts turned back again into Egypt.*
>
> ACTS 7:38–39

We are witnessing today a recapitulation of Moses' experience with the Jews of his day. Protestant fundamentalist Christians have their eyes on the sky, their heads in the clouds, their hearts in Egypt, and their children in the government's schools. So, for that matter, do most of the other Christian groups. The handful of Christian Reconstructionist authors who are serving as modern-day Stephens with respect to defending the continuing validity of biblical law experienced a response from the various ecclesiastical Sanhedrins of our day somewhat analogous to the response that Stephen's testimony produced: verbal stones. (Prior to 1986, we received mostly stony silence.)

If the modern church were honest, it would rewrite one of the popular hymns of our day: "O, how hate I thy law, O, how hate I thy law. It is my consternation all the day." But the modern church, hating God's revealed law with all its Egyptian heart, is inherently dishonest. It is self-deceived, having no permanent ethical standards to use as an honest mirror. The hearer of the word who refuses to obey, James says, is like a man who beholds his face in a looking glass, walks away, "and straightway forgetteth what manner of man he was" (James 1:24b). The modern Christian refuses even to pick up the mirror of God's law and look.

A. Why an Economic Commentary?

I have explained in the Introduction to my economic commentary on Genesis why I began this project in 1973.[1] I presented there my case for the whole idea of a specifically economic commentary. Basically, my reason is this: the Bible presents mankind with a God-mandated set of social, economic, educational, political, and legal principles that God expects His people to use as permanent blueprints for the total reconstruction of every society on earth. My *Economic Commentary on the Bible* provides a model of what kind of exegetical materials can and must be produced in every academic field if Christians are successfully to press the claims of Christ on the world. After the publication of the first two commentaries on Exodus, I also edited and published a ten-volume set of books that I called the Biblical Blueprints Series, four of which I wrote.[2]

What I want to stress from the outset is that writing this economic commentary has been very nearly a bootstrap operation. For almost 2,000 years, Bible commentators—Jews and gentiles—have simply not taken seriously the specific details of Old Testament law. Despite the fact that John Calvin did preach about 200 sermons on the Book of Deuteronomy, including its case laws,[3] and that the Puritans, especially the New England Puritans, did take biblical law seriously,[4] they did not write detailed expositions showing how these laws can be applied institutionally in New Testament times.

I found only two exegetical books repeatedly useful in writing this volume: R. J. Rushdoony's *Institutes of Biblical Law* (1973) and James Jordan's *Law of the Covenant* (1984). Both are recent studies, and both were written by people who shared my view of how the Old Testament case laws should be read, interpreted, and applied in New Testament times. This exegetical approach is unquestionably new, especially when coupled with Cornelius Van Til's presuppositional apologetics. This is why the Christian Reconstruction movement does represent a major break with recent church history. On this point—and just about

1. Initial presentations of my economic commentary on the Pentateuch appeared monthly in the *Chalcedon Report*, from 1973 until 1981.

2. Published by Dominion Press, Ft. Worth, Texas, 1986–87. I wrote the books on monetary theory, economic theory, foreign policy, and the introductory volume on biblical liberation.

3. John Calvin, *Sermons on Deuteronomy* (Edinburgh: Banner of Truth Trust, [1683, 1685] 1987).

4. Symposium on Puritanism and Law, *Journal of Christian Reconstruction*, V (Winter 1978–79).

only on this one—Reconstructionism's critics are correct. We represent a discontinuity in church history.[5] Christian Reconstructionists alone have gone to the Bible's legal passages in search of permanent authoritative guidelines ("blueprints") for what society ought to do and be. In this sense, we Reconstructionists are theological revolutionaries. If our view of biblical law continues to spread to the Christian community at large, as we expect it to do, there will eventually be a social revolution—hopefully nonviolent change, but unquestionably revolutionary. Why revolutionary? Because one of the primary manifestations of the revolutionary character of this change will be a radical and comprehensive alteration of the West's legal order.

This commentary is the foundation of my attempt to reconstruct the entire field of economics in terms of the Bible. If I did not have total confidence in the Bible, I would not even attempt such an outlandish task. It involves too great a break with the past, as well as a break with the fundamental presuppositions of the most methodologically rigorous of all the social sciences, economics. To attempt such a project, a man has to be confident. To do so as part of a movement which seeks to reconstruct every other field also requires confidence.

B. The Question of Confidence

This "Reconstructionist confidence" is frequently misunderstood. Our numerous critics view it as arrogance. Those who accuse theonomists of arrogance miss the point: *we are totally confident in biblical law*. We are also totally confident that without biblical law, there is no way to create a self-consistent intellectual system or academic discipline. On the other hand, we are not totally confident in our specific applications of the law to real-world problems. Thus, while we acknowledge that we may be wrong in our particular interpretations, there is no possibility that we are wrong in our general intellectual strategy. King David said it well: he was wiser than his enemies, his teachers, and the ancients because of his commitment to, and continual study of, the law of God (Ps. 119:98–100). So am I, for the same reason. David had many enemies because of this confidence; so do I. So do Reconstructionists in general. But understand: *ours is not self-confidence; ours is confidence in the law*. However inferior our minds

5. I hope that it will be regarded by future church historians as a discontinuity analogous to the appearance of the Wycliffe movement or the advent of the Reformation rather than that other bold discontinuity, the introduction around the year 1000 of the doctrine of transubstantiation.

or intellectual skills may be in comparison to the pagan giants of the age, or even of the past, Christians have the one thing that none of them possessed: covenant theology. The more we understand God's revealed law, the greater our advantage over those who do not understand it. It is not primarily a matter of intellect; it is primarily a matter of ethics.

The task we Christian Reconstructionists have set for ourselves—the reconstruction of every intellectual discipline and social institution in terms of the Bible—has always been the task of the church as *ekklesia*. The more that Christians have deferred to the humanists in intellectual affairs, the more pressing this task of reconstruction has become. Philosopher Alvin Plantinga was correct: our enemies have established the operating presuppositions in every academic field. "In each of these areas the fundamental and often unexpressed presuppositions that govern and direct the discipline are not religiously neutral; they are often antithetic to a Christian perspective. In these areas, then, as in philosophy, it is up to Christians who practice the relevant discipline to develop the right alternatives."[6] What he neglected to mention is that when Christians within the discipline fail to develop the right alternatives—or, in the case of economics, any alternatives—then someone outside the field has to attempt it.[7]

C. Conflicting Hermeneutics

Because of our commitment to the Old Testament case laws, Christian Reconstructionists' intentions are frequently misinterpreted. For example, Robert M. Bowman, Jr. complained: "One distressing application of theonomy by the Reconstructionists is their charge that all who reject any aspect of theonomy are 'antinomian' (against the law) and are pursuing 'autonomy' (self-law). According to Recon-

6. Alvin Plantinga, "Advice to Christian Philosophers (With a special preface for Christian thinkers from different disciplines)," *Truth*, I (1985), p. 11.

7. Thomas Kuhn, in his influential book, *The Structure of Scientific Revolutions*, 2nd ed. (Chicago: University of Chicago Press, [1962] 1970), argued that the major paradigm shifts in any discipline are inaugurated by younger researchers who are either very young or very new to the field (pp. 89–90). These breakthroughs are often made by two types of researchers: skilled amateurs operating outside the guild's disciplinary system and obscure professionals laboring on the fringes of the academic discipline. For example, Darwin was an unknown amateur naturalist who had been laboring for almost three decades outside any academic setting when *Origin of Species* appeared. He had come to his insights as a young man, but had not had the courage or incentive to publish his thesis until much later. Einstein was an obscure clerk in the Swiss patent office when he made his major breakthroughs in physics.

structionists, it is either autonomy or theonomy; there apparently is no middle ground."[8]

1. Autonomy or Theonomy

He was correct with respect to the "either/or" assertion by theonomists, but incorrect regarding our concern over the acceptance of specific laws. Those who have written the major Reconstructionists books have not argued that "all who reject any aspect of theonomy are 'antinomian' (against the law) and are pursuing 'autonomy' (self-law)." Serious Bible students can, do, and will continue to disagree regarding the proper application of specific Old Testament laws, both in ancient Israel and in the present New Covenant era. Our definition of antinomianism is the principle of biblical interpretation (hermeneutic) which says, in Bowman's correct description of dispensationalism, that "the commands of the Law are presumed to be no longer binding except where the New Testament repeats or ratifies them."[9] We would agree with Bowman when he concluded that "dispensationalism, technically speaking, is antinomian, though more in theory than practice; . . ."[10]

This is precisely the Reconstructionists' point: most of our opponents are antinomian in theory, though not necessarily in practice (i.e., in the specific details of personal ethics).[11] It is not the details of the personal ethics of our critics that concern Reconstructionists theologically; rather, it is our opponents' governing principle of interpretation regarding Old Testament law in New Testament times. Our primary theological distinctives as a movement are judicial and cultural. We do not ignore the question of personal ethics, but *personal ethical issues must inevitably be dealt with intellectually on the basis of some general principle of biblical interpretation.* Our principle of biblical interpretation is explicit (theonomy); that of our opponents is generally implicit (antinomianism). Our hermeneutical explicitness is now forcing our critics to respond explicitly, and this pressure bothers them. They resent it. They must give up either their antinomianism or their claims to cultural relevance as Christians. They do not want to give up either position, but they no longer have any intellectual

8. Robert M. Bowman, Jr., "The New Puritanism: A Preliminary Assessment of Reconstructionism," *Christian Research Journal*, X (Winter/Spring 1988), p. 26.

9. *Ibid.*, p. 25.

10. *Ibid.*, p. 26.

11. Given the sexual scandals of television evangelists Jim Bakker in 1987 and Jimmy Swaggart in 1988, Christian Reconstructionists are sorely tempted to conclude that dispensationalism tends toward antinomianism in practice, too.

choice. They do not like to admit this, however. It disturbs them. But if they had an answer, someone in the evangelical world would provide at least an outline of a comprehensive Christian social theory based neither on biblical case laws nor natural law theory. We are still waiting. It has been over 1,900 years.

Their silence in this time of escalating international crises, in every area of life, in the decades immediately preceding the third millennium after Christ, is an important reason for the growing influence of Christian Reconstructionism. Their silence is costing them heavily, but so will any attempt to respond to us without offering a biblically plausible alternative worldview. You cannot beat something with nothing.

2. Dispensationalism by Any Other Name

Dispensationalists have in the past been ethically explicit, denying God's Bible-revealed law in the New Covenant era. They have been self-conscious theological antinomians. They have argued for decades that a person can be saved eternally by accepting Jesus as Savior but not as Lord, a radically antinomian and widely accepted opinion which one of their number recently criticized quite eloquently.[12] Nevertheless, most of the leading intellectual targets of our theological criticisms have publicly disassociated themselves from dispensationalism. They deeply resent being tarred and feathered by us with dispensationalism's antinomian brush, yet when they reply to our accusations, they adopt the hermeneutic of dispensationalism regarding the Old Testament case laws. This poses continuing intellectual problems for them.[13]

Their original reaction was stony silence. It took two decades for Christian Reconstructionists to gain even a hostile public reception; until the mid-1980s, our theological opponents usually played the children's game of "let's pretend": "Let's pretend that the Reconstructionists are not here, and maybe they will go away soon!" Finally, when they correctly concluded that we were not going away, some of them started their public attacks.[14] Prior to this, most of them had been content with murmuring, plus spreading an occasional nasty rumor.

12. John F. MacArthur, Jr., *The Gospel According to Jesus* (Grand Rapids, Michigan: Zondervan, 1988).

13. Cf. Gary North, *Political Polytheism: The Myth of Pluralism* (Tyler, Texas: Institute for Christian Economics, 1989), Part 2.

14. I include the various academic Sanhedrins in this observation. Try to find as many as five book reviews of Christian Reconstructionist books in either *Bibliotheca Sacra* or the *Westminster Theological Journal*, 1963–88.

They adopted the second strategy: publishing hostile but brief reviews. It was too late; by 1985 we had too many books in print and too many names on our computerized mailing lists. The theological paradigm shift was too far advanced, not to mention the paradigm itself. To call attention to us publicly has become increasingly risky, given the voluminous quantity of our books. Too many bright young Christian scholars and activists were already being alerted to our existence, and we are enlisting many of them. Yet not calling attention to us publicly made it appear as though the critics had no coherent answers.

There has been a third strategy: attacking a brief outline or caricature of a few of the ideas of the Reconstruction movement, but without naming its leaders or any of our books. This will not work either, although it does delay the day of ideological reckoning. I call this strategy "hide and don't seek." The critic hides all specific references to our books, and hopes that his followers will not locate the unmentioned original sources.[15]

Our critics would much prefer to live in a world where they are not forced to deal with public issues in terms of a specific definition of Christian ethics, meaning *specific Old Testament civil laws with their accompanying public sanctions*. They wish that theonomists would go away and leave them in their ethical slumber. We won't. That is what the 1980s demonstrated: theonomists will not go away. We will not shut up. Our critics can ignore us no longer and still remain intellectually respectable. We have written too much, and we continue to write. Fifteen years after the publication of R. J. Rushdoony's *Institutes of Biblical Law* (1973), over a decade after the publication of Greg L. Bahnsen's *Theonomy in Christian Ethics* (1977), there was still only one brief book-length academic reply from any critic in any theological camp: Walter Chantry's.[16] It was apparent that the professional

15. An example of this tactic is found in Charles Colson's defense of pluralism and ethical dualism, *Kingdoms in Conflict*, co-published by William Morrow (secular humanist) and Zondervan (fundamentalist) in 1987. He mentioned the theonomist movement, but never named any of these "utopians," as he called us (pp. 117–18). Why not name us? If the targets of your attack are "doomed to failure" (p. 117), why not at least identify us? If we are dead, then give us a decent Christian burial!

16. In late 1988, two critical books appeared: Dave Hunt, *Whatever Happened to Heaven?* (Eugene, Oregon: Harvest House), and H. Wayne House and Thomas Ice, *Dominion Theology: Blessing or Curse?* (Portland, Oregon: Multnomah Press), to which Greg Bahnsen and Kenneth Gentry wrote a reply: *House Divided: The Break-Up of Dispensational Theology* (Tyler, Texas: Institute for Christian Economics, 1989). A third critique appeared in 1989: Hal Lindsey, *The Road to Holocaust* (New York: Bantam), refuted by Gary DeMar and Peter J. Leithart, *The Legacy of Hatred Continues* (Tyler,

theologians had been playing a game of "hide and go sleep." This tactic was adopted for a decade and a half, from 1973 to mid-1988. It did not work. I find it amusing that the humanist media paid more attention to Christian Reconstruction in 2011 than the theologians have. The media ran articles on the alleged influence of dominionists, meaning Christian Reconstructionists, on three of the candidates running for the Republican nomination for President. In the case of Ron Paul, this was true, but only in the area of economic policy. I was his staff economist in 1976. Very few of the media's reporters knew this. The media focused on Michelle Bachmann and Rick Perry. The influence was indirect if it existed at all. A Google search in September 2011 for "dominionists" and "Tea Party" produced 550,000 hits.

3. The Silence Is Deafening

Those few theological critics who have gone into print against us have generally been amateur theologians and imitation scholars.[17] They have read a few of our newsletters and a couple of our books (if that), and then have invented the rest. They have refuted stick men of their own creation. They forget that stick men burn easily, setting aflame those who rely heavily on them. This makes it easy for us to refute them. We cite them word for word, we show that they are either deliberately lying or have failed to read more than a tiny fraction of what we have written, and then we wait for the next willing victim.[18] If a critic cannot accurately summarize what his opponents have said, with direct citations from original sources to prove his point, and then refute what his opponents have said by showing that they are inconsistent, ignorant, or intellectually dishonest, the critic is in no position to go into print. Yet this is what our critics have done. It

Texas: Institute for Christian Economics, 1989). Gary DeMar already has co-authored one book replying to earlier criticisms by Hunt: *The Reduction of Christianity* (Ft. Worth, Texas: Dominion Press, 1988). A second book replies to issues raised in the April, 1988, debate: Hunt and Ice vs. DeMar and North: Gary DeMar, The *Debate Over Christian Reconstruction* (Ft. Worth, Texas: Dominion Press, 1988).

17. An exception was Westminster Seminary's Meredith G. Kline, who made the intellectually fatal mistake of attacking in print Greg Bahnsen's *Theonomy* in the Fall 1978 issue of the *Westminster Theological Journal*. Bahnsen's reply silenced Kline. Kline got his academic head handed to him on a platter. See Greg L. Bahnsen, "M. G. Kline on Theonomic Politics: An Evaluation of His Reply," *Journal of Christian Reconstruction*, VI (Winter 1979–80), pp. 195–221.

18. See, for example, my reply to Rodney Clapp's article, "Democracy as Heresy," *Christianity Today* (Feb. 20, 1987): "Honest Reporting as Heresy: My Response to Christianity Today" (1987), reprinted in Gary North, *Westminster's Confession: The Abandonment of Van Til's Legacy* (Tyler, Texas: Institute for Christian Economics, 1991), Appendix B.

has been amateur night at the critics' typewriters for the last four decades. (They resent it when I say so in print repeatedly.)

Meanwhile, we keep publishing. The longer a competent critic waits to produce a comprehensive, detailed attack on us, the more difficult his job becomes. No intelligent critic wants to become a sacrificial lamb who is subsequently exposed publicly as someone who failed to do his homework. This is why time is on our side. This is also why we are so confident in our theological paradigm. After four decades of either silence or intellectually third-rate published criticisms of our work, we are increasingly persuaded that we have the theological goods, while our critics are holding empty theological bags. This confidence on our part is occasionally visible, and it makes our critics hopping mad, so they rush into print with yet another third-rate, easily answered criticism. The prudent ones still keep their mouths shut and wait for us to go away.

Do not misunderstand me. Far be it from me to say that our critics should remain silent. I have waited for a long time to see a well-thought-out, detailed critical analysis from someone, an analysis that does not rely on lists of ideas that we do not believe and sometimes have specifically attacked (e.g., "Reconstructionists believe that the world will be transformed through political action"). A wise innovator knows the weak points in his own system. There is no man-made system without weak points. If a critic ever appears who can zero in on the weak points of Christian Reconstructionism, he will receive my respect. Better to sharpen one's skills by arguing the basic points with a competent critic than bludgeoning a long series of amateurs. What I am saying, however, is that we have yet to see even one critic who understands our system well enough to go for the theological jugular. In short, we have done our homework; our published critics have not. ("If that be arrogance, make the best of it!")

What Christian Reconstructionists argue is that virtually all schools of biblical interpretation today, and too often in the past (excepting only the Puritans), have been far closer to dispensationalism's hermeneutic principle—"the commands of the Law are presumed to be no longer binding except where the New Testament repeats or ratifies them"—than to the theonomists' hermeneutical principle, also correctly summarized by Bowman: "[T]he commands of the Law are presumed to be binding today except where the New Testament modifies them or sets them aside in some manner. "[19] This is why Christian

19. Bowman, *op. cit.*, p. 25.

Reconstructionism does represent a break with traditional Protestant theology, not in the details of theology—our distinguishing theological beliefs have all been preached before within orthodox circles—but in *our packaging of a unique, comprehensive system*: predestination, covenant theology, biblical law, Cornelius Van Til's presuppositional apologetics,[20] and postmillennialism.

D. Beating Something With Something Better

It is my opinion, stated repeatedly, that you cannot beat something with nothing. This is the strategic and tactical problem facing Christians today whenever they seek to challenge apostate humanism in any sphere of life. This inescapable fact of political life is the major stumbling stone for non-theonomic Christian activists. Christian pietists who self-consciously, religiously, and confidently deny that Christians should ever get involved in any form of public confrontation with humanism, for any reason, have recognized this weakness on the part of antinomian Christian activists. They never tire of telling the activists that they are wasting their time in some "eschatologically futile reform program." Such activism is a moral affront to the pietists. Those of us who have repeatedly marched in picket lines in front of an abortionist's office have from time to time been confronted by some outraged Christian pietist who is clearly far more incensed by the sight of Christians in a picket line than the thought of infanticide in the nearby office. "Who do you think you are?" we are asked. "Why are you out here making a scene when you could be working in an adoption center or unwed mothers' home?" (These same two questions seem equally appropriate for the pietist critic. Who does he think *he* is, and why isn't *he* spending his time working in an adoption center or an unwed mothers' home?)

Pietists implicitly and occasionally explicitly recognize that *the vast majority of today's implicitly antinomian Christian activists possess no biblical blueprint for building a comprehensive alternative to the kingdom of humanism*. The pietistic critics of activism also understand that in any direct confrontation, Christians risk getting the stuffings—or their tax exemptions—knocked out of them. They implicitly recognize that a frontal assault on entrenched humanism is futile and dangerous if you have nothing better to offer, since you cannot legitimately expect

20. If there is one major break with traditional Christianity, it is here—apologetics—which is a philosophical break, not a discontinuity in theology proper. Van Til's apologetic method is unquestionably radical, for it refutes natural law theory.

to beat something with nothing. They implicitly recognize that neither modern fundamentalism nor modern antinomian evangelicalism has any such blueprint, and therefore neither movement has anything better to offer, i.e., nothing biblically sanctioned by God for use in New Testament times (the so-called Church Age). Fundamentalism and evangelicalism deny the legitimacy of any such blueprint, for *blueprints inescapably require civil law and civil sanctions*. Fundamentalists have for a century chanted, "We're under grace, not law!" They have forgotten (or never understood) that this statement inescapably means: "We're therefore under humanist culture, not Christianity." When reminded of this, they take one of three approaches: (1) abandon their fundamentalism in favor of Christian Reconstructionism, (2) abandon their activism, or (3) refuse to answer.[21]

Worse, those scholars who have accepted the intellectual burden of defending the Christian faith have generally had an abiding hatred for God's Bible-revealed law. "Hatred" is the proper word. "Indifference" misses the point. "Ignorance" would be misleadingly gentle. *There can be no neutrality regarding God's revealed law, any more than there can be neutrality regarding God's revelation of Himself*. You either accept His authority over you or you reject it. You either accept His law's authority over you or you reject it. Pietists reject it.

God's authority over mankind is manifested ethically by His law, and it is manifested judicially by His law's sanctions. You either affirm God's law in its specifics, especially its sanctions, or you deny it, especially its sanctions. You either accept the 119th psalm or you reject it. "I will delight myself in thy statutes: I will not forget thy word" (Ps. 119:16). There is no middle ground. Middle ground with respect to anything in the Bible is always deception: either self-deception or self-conscious deception of others.

The general attitude of the modern fundamentalist world—and really, of the whole evangelical world—regarding the authority of God's law today was stated plainly in 1963 by then-Professor S. Lewis Johnson of Dallas Theological Seminary, in the seminary's scholarly journal, *Bibliotheca Sacra*: "At the heart of the problem of legalism is pride, a pride that refuses to admit spiritual bankruptcy. That is why the doctrines of grace stir up so much animosity. Donald Grey Barnhouse, a giant of a man in free grace, wrote: 'It was a tragic hour when the Reformation churches wrote the Ten Commandments into

21. Gary North, "The Intellectual Schizophrenia of the New Christian Right," *Christianity and Civilization*, No.1 (1982), pp. 1–40.

their creeds and catechisms and sought to bring Gentile believers into bondage to Jewish law, which was never intended either for the Gentile nations or for the church.'[22] He was right, too."[23] Operationally, all denominations believe this today, but it took Presbyterian Barnhouse and independent fundamentalist Johnson to state the position plainly.

Dispensationalist Roy L. Aldrich also did not flinch from the same conclusion: "…the entire Mosaic system—including the Ten Commandments—is done away.[24] Again, "the Mosaic ten laws cannot apply to the Christian," although he hastened to affirm that "the New Testament believer is not without the highest moral obligations."[25] Problem: these supposedly high moral obligations are unaccompanied by specific biblical content or specific biblical sanctions. That is to say, the Christian is on his own, making up his own rules as he goes along, at best illuminated by the mystical whisperings of the Holy Spirit. (If anyone wonders why Dallas Seminary has experienced student outbreaks of antinomian versions of Pentecostalism, which Dallas' dispensational "no signs in the Church Age" theology explicitly rejects, and even outbreaks within its own faculty,[26] he need search no further than Dallas Seminary's antinomian theology. If God does not direct Christians through His law, then only mysticism, antinomian intuition, and inner voices remain to provide uniquely "Christian" guidance.)

This hostility to Old Testament law is also why dispensationalism has always had an unstated working alliance with modern humanism: they both share an antinomian theology that seeks to "liberate" man and the state from the restraints of God's revealed law and its sanctions. Their agreement has been simple: Christians should stay out of politics as Christians. This explicit antinomianism is also why dispensationalism has never developed an explicitly Christian social theory. If it could have, it would have, especially in the crucial years of

22. He cited Barnhouse, *God's Freedom*, p. 134.

23. S. Lewis Johnson, "The Paralysis of Legalism," *Bibliotheca Sacra*, Vol. 120 (April/June 1963), p. 109.

24. Roy L. Aldrich, "Has the Mosaic Law Been Abolished?" *ibid.*, Vol. 116 (Oct. 1959), p. 326.

25. *Ibid.*, p. 331.

26. Two Dallas Seminary professors resigned and one was fired in 1987 because of their commitment to the legitimacy of the gifts of physical healing in the "Church Age." See *Christianity Today* (Feb. 5, 1988), p. 52; Jack Deere (one of the dismissed professors), "Being Right Isn't Enough," in Kevin Springer (ed.), *Power Encounters* (New York: Harper & Row, 1988), ch. 8.

protest, 1965–71. The silence of dispensational leaders and scholars in those years indicated that the movement was incapable of responding to real-world problems. In that era, dispensationalism committed intellectual suicide. By 1990, intellectual rigor mortis had visibly set in.[27]

E. Natural Law Philosophy and Antinomianism

Some variation of the dispensational hermeneutic has long been adopted by theologians who officially claim they reject the idea of an ultimate ethical dualism between the Old Testament and New Testament. A good example is the statement by Robert Dabney, the Calvinist Presbyterian of the late-nineteenth-century American South. He assured us that the Ten Commandments provide universal ethical standards. "Although the Ten Commandments were given along with the civil and ceremonial laws of the Hebrews, we do not include them along with the latter, because the Decalogue was, unlike them, given for all men and all dispensations."[28] The Ten Commandments were basically the Hebrews' version of natural law. "It is a solemn repetition of the sum of those duties founded in the natures of man and of God, and on their relations, enjoined on all ages alike."[29]

Dabney's primary presumption is obvious: the whole of the Old Testament civil legal order is a dead letter, because the case laws are no longer judicially binding. His secondary presumption is also obvious: the case laws were not covenantally connected to the Decalogue. They were merely temporary injunctions. Not so the Ten Commandments. "Hence, all the principles of right stated or implied in this Decalogue, are valid, not for Hebrews only, but for all men and ages. They rise wholly above the temporary and positive precepts, which were only binding while they were expressly enjoined."[30] He even argued that Christ's words in Matthew 5:18 applied only to the Ten

27. By 1990, Talbot Seminary in California had quietly departed from original dispensationalism. Its 2011 statement of faith does not mention the Rapture, the Great Tribulation, or the restoration of temple sacrifices. Dallas Seminary was staffed by a faculty that paid little or no attention to the theological system of C. I. Scofield, Lewis Sperry Chafer, John Walvoord, Dwight Pentecost, and Charles Ryrie (who had long since departed). The "new, revisionist dispensationalism" taught by Prof. Wayne House and others was in fact the repudiation of key dispensational tenets, though not the pre-tribulational Rapture doctrine. Only the faithful donors who no longer read *Bibliotheca Sacra* remained unaware of what had happened. House's *Dominion Theology: Blessing or Curse?* was as far from Scofield as John MacArthur's *The Gospel According to Jesus*.

28. Robert L. Dabney, *A Defence of Virginia [And Through Her, of the South]* (New York: Hale & Son, 1867), p. 122.

29. *Idem*.

30. *Ibid*., p. 123.

Commandments: "Till heaven and earth pass, one jot or one tittle of this law shall not pass away."[31]

This has been the ethical argument of Christian commentators almost from the beginning.Without exception, such a dispensationalist ethical argument rests either implicitly or explicitly on some version of *natural law philosophy*. If you abandon the continuing judicial authority of the Mosaic case laws *and their sanctions*, you must actively adopt or at least passively accept some other civil law structure to serve as the judicial basis of society. There are no judicial vacuums. *Either God's revealed law is sovereign in society or else autonomous man's declared law is sovereign*. There is no third choice. When a Christian denies the unbreakable connection between the case laws and the Ten Commandments, he must then seek to apply the "general moral principles" of the Decalogue to his own society in order to provide legitimacy to the "common legal order." Yet he is then forced by his theory of natural law to defend the Decalogue's highly general principles in terms of their common status among all "right thinking" people.

There is a major problem here: *there have been so many wrong-thinking tyrants and societies in history*. Christians have suffered under many of them, usually in silence, for they have been taught that there are no specific legal standards of righteousness on which to base a legitimate appeal to God (for example, by corporately praying the imprecatory psalms, such as Psalm 83). Nevertheless, Christians again and again have proclaimed their nearly unqualified allegiance to this or that humanist alternative to biblical social order. They base their allegiance on the supposed "natural conformity" to the Decalogue of their societies' legal order. Natural law theory then becomes an all-purpose smoke screen for the Christians' passive (or even active) acceptance of specific social evils.

F. The Problem of Social Reform

The acceptance of natural law philosophy inevitably leads to two possible and recurring evils. First, it paralyzes the Christians' legitimate efforts to reform society, for it denies that there are specific biblical blueprints for social reform. This is the curse of the pietistic *escape religion* on Christianity. Second, it enables humanist reformers to enlist Christians in this or that reform effort that is wrapped in the language of the Ten Commandments but which is in fact inspired

31. *Idem*.

by covenant-breakers and designed to further their aims. This is the curse of the *power religion* on Christianity.

In American history, no better example exists of both of these processes than the Unitarians' successful enlisting of evangelical Christians in the state-centralizing abolitionist movement.[32] The fact is, the Quakers had pioneered the theory of abolitionism in the 1755–75 period, decades before the Unitarian Church even existed. The unwillingness of Trinitarian American Christians to obey the New Testament teachings with regard to the illegitimacy of lifetime chattel slavery allowed the Unitarians to capture the Quakers' issue and fan the evangelicals' moral fervor, 1820–65, which in turn allowed them to capture the whole country for the Unitarian worldview from the 1860s onward.[33] In short, American Christians ignored their social responsibilities by ignoring the Quakers' moral challenge regarding chattel slavery (1760–1820), for they did not recognize or acknowledge the judicial authority of the New Testament on this question.[34] As a result, they became institutionally and intellectually subordinate to those who hated Christianity (1820–1865).

Simultaneously, a parallel phenomenon took place with the rise of the state school systems, another Unitarian reform in the United States. Funded by Christian taxpayers, the schools have been operated in terms of an alien worldview.[35] *The escape religion led to the triumph of the power religion*. It always does. Dominion religion invariably suffers. This defeat of dominion religion is the temporal goal of the power religionists and the escape religionists, of Pharaoh and the enslaved Israelites. They always want Moses to go away and take his laws with him.

These two evil consequences of natural law theory—retreat from social concerns and the co-opting of Christians by non-Christian social reformers—have been the curse of natural law theory for almost two millennia. Dabney could have protested until kingdom come—or until Sherman's army came—against the anti-Constitution agenda of

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32. Otto Scott, *The Secret Six: John Brown and the Abolitionist Movement* (New York: Times Books, 1979), reprinted by the Foundation for American Education; Bertram Wyatt-Brown, *Lewis Tappan and the Evangelical War Against Slavery* (Cleveland, Ohio: Case Western Reserve University Press, 1969).

33. R. J. Rushdoony, *The Nature of the American System* (1965), ch. 6: "The Religion of Humanity."

34. See Chapter 4: "A Biblical Theology of Slavery."

35. R. J. Rushdoony, *The Messianic Character of American Education* (Nutley, New Jersey: Craig Press, 1963).

the northern Abolitionists,[36] but his own commitment to natural law philosophy undercut his theological defense. He did not understand that when a law-abiding Christian adopts a hostile attitude toward the case laws of the Old Testament, he necessarily also adopts an attitude favorable to natural law theory, which is inescapably philosophical humanism: common-ground philosophy, common-ground ethics, and the autonomy of man.[37] Dispensationalist theologian and natural law philosopher Norman Geisler was simply more forthright regarding this necessary two-fold commitment: anti-Old Testament law and pro-natural law philosophy.[38] (It is unfortunate that both Cornelius Van Til and Francis Schaeffer were inconsistent in this regard: they ignored or denied the New Testament authority of biblical law, yet also officially denied natural law philosophy. This has produced great confusion among their respective followers.)[39]

For two centuries, humanists in the United States have been enlisting Christian evangelicals into a seemingly endless stream of "save the world" programs. The humanists cry out, "Baptize us! Baptize us! . . . and please take up a compulsory collection for us." For two centuries, well-meaning Christians have been digging deep into their wallets in order to supply the tax collectors with funds to finance a series of supposedly religiously neutral social reform programs that

36. *Defense of Virginia*, Conclusion.

37. Archie P. Jones, "Natural Law and Christian Resistance to Tyranny," *Christianity and Civilization*, No.2 (1983), pp. 94–132.

38. Norman Geisler, "A Premillennial View of Law and Government," in J. I. Packer (ed.), *The Best in Theology* (Carol Stream, Illinois: Christianity Today/Word, 1986). Wrote the *Fundamentalist Journal* (Sept. 1988): "Geisler credits [Thomas] Aquinas with 'having the most influence on my life,' and says that if his house were burning he would grab his wife, his Bible, and the *Summa Theologiae* by Aquinas" (p. 20). It is hardly surprising that he was a professor of philosophy at Baptist fundamentalist Liberty University. The anabaptists, who possess no separate philosophical tradition of their own, have always relied on the philosophy of medieval Roman Catholic scholasticism to defend their cause.

39. See North, *Political Polytheism*, chapter 2: "Halfway Covenant Ethics," and chapter 3: "Halfway Covenant Social Criticism." Van Til's self-conscious rejection of both dispensationalism and natural law theory left him without any concept of social law or social justice, for he also rejected the continuing authority of the Old Testament case laws by silence in his published writings and explicitly in private communications. Thus, his system was always incomplete, hanging timelessly in the air like a ripe fruit that has just begun its fall to the ground. That the fruit was grabbed by R. J. Rushdoony in the early 1960s did not please Van Til, but there was not much that he could politely do about it. He had to remain silent, for his system is inherently ethically silent: it rejects both forms of law, natural and biblical, which is why he explicitly denied ethical cause and effect in history, and why he implicitly adopted the humanists' version of ethical cause and effect: the good guys lose in history, and the bad guys win.

have been created by the messianic state and staffed by humanist bureaucrats. Taxpayer-funded, evolution-teaching government schools have been the most persistent, effective, and representative example of this continuing delusion. Without the spurious supporting doctrine of morally and intellectually neutral natural law, it would not be possible for the humanists to wrap these anti-Christian programs in the ragged swaddling clothes of common morality.

G. "Normal Science"

Our critics in 1985 legitimately replied, "All right, let's see if you can make sense of the case laws. Let's see how you would apply them to today's problems. Put up or shut up." Since I did not intend to shut up, I "put up." This book is a detailed study of the economic applications of the case laws of Exodus. It offers no grand hypothesis, no major breakthrough in biblical hermeneutics. It is an example of what someone can accomplish if he is willing to spend a lot of time thinking about the specifics of biblical law, comparing his conclusions with contemporary scholarship in several areas. To write this book, I have made a detailed study of modern economics, plus at least a cursory examination·of the relatively new academic discipline of law and economics, plus studies of Jewish jurisprudence (Mishnah and Talmud), modern criminology, the history of slavery, and ecology. This effort I regard as basic intellectual trench work, or what Thomas Kuhn called "normal science."[40] It is not in the same league with a breakthrough book like Rushdoony's *Institutes of Biblical Law*,[41] with its innovative insight that each of the case laws of the Bible can be subsumed under one of the Ten Commandments (even if the thesis is overstated),[42] and which surveys a wide array of topics—academic, cultural, historical, and contemporary. *Tools of Dominion* has neither the precision nor the relentlessness of Greg Bahnsen's apologetic defense of biblical law in *Theonomy in Christian Ethics*. It does not have the organizational power of the five-point covenant.[43] It does not have the innovative insights into biblical meaning that James Jordan's

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40. Thomas Kuhn, *The Structure of Scientific Revolutions, op. cit.* Kuhn distinguished normal science from a scientific revolution that produces a major paradigm shift.

41. R. J. Rushdoony, *The Institutes of Biblical Law* (Nutley, New Jersey: Craig Press, 1973).

42. James B. Jordan, *The Law of the Covenant: An Exposition of Exodus 21–23* (Tyler, Texas: Institute for Christian Economics, 1984), pp. 22–23.

43. Ray R. Sutton, *That You May Prosper: Dominion By Covenant*, 2nd ed. (Tyler, Texas: Institute for Christian Economics, [1987] 1992).

"maximal" hermeneutic offers.[44] It just plugs along, trying to make economic sense out of the details of the case laws.

Despite these limitations, this book still is part of my overall publishing strategy. If a reader is impressed with my conclusions regarding both the wisdom and the benefits that the case laws of Exodus offer, he will be pulled in the direction of the Christian Reconstructionists' paradigm. If he rejects the paradigm, he will then find himself asking: "Why do the case laws seem to be workable? Why have previous Christian theologians ignored the case laws? What was it in their theological paradigms that kept them from seeing how relevant the case laws are?" When a person starts asking himself such questions, he is approaching a personal paradigm shift.

Unless a whole series of studies like this one come into print, the brilliance of the previously mentioned paradigm-shifting theonomic books will fail to capture the minds of future generations of Christians. The proof of the pudding is in the eating, says an old slogan; similarly, the proof of theonomy is in its judicial applications. If what this book insists regarding the case laws of Exodus is not true—if they cannot in fact be applied productively in New Testament societies—then the brilliance of the theonomic paradigm is like the brilliance of a burning bush that is soon consumed by the fire. The paradigm is wood, hay, and stubble. So, while this book is not intended to be paradigm-shifting, it is unquestionably designed to be paradigm-confirming and paradigm-luring. In 1990, I wrote: "If the reviewers do anything except pan this book, they will have aided the theonomists' cause, but if they pan it without having effectively discredited the case laws themselves, they will have identified themselves to their more perceptive readers as intellectual lightweights." There were few reviewers, 1990–2011.

This is why I did not expect the book to be widely reviewed in 1990. This, plus its size. A reviewer cannot fake a review of a book on the case laws. The subject matter is just too complex. Reviewers will actually have to read the book before reviewing it negatively, something our critics so far have been unwilling to do with our previous books. I expect the silence to continue. This, too, is now in our favor. The word is spreading: our critics have no answers to our paradigm.

Yes, this is a fat book. But, like Volume I of Rushdoony's *Institutes of Biblical Law*, this book is divided into bite-sized portions: compact

44. James B. Jordan, *Judges: God's War Against Humanism* (Tyler, Texas: Geneva Ministries, 1985).

chapter sections and subsections. To make things as easy as possible for the reader, I have structured it for easy preliminary scanning and easy review. You deal with it as you would eat an elephant: one bite at a time. Chew well; it is occasionally tough.

H. A Final Note to Readers and Critics

Richard Baxter, in 1673, listed seven highly predictable objections to his *Christian Directory*. I feel compelled to list the first three again, though not his specific answers. (I have also dropped his italics.) I too have heard variations of these objections repeatedly.

> Objection I: "You have written too many Books already: Who do you think hath so little to do as to read them all?"
>
> Objection II: "Your Writings differing from the common judgment have already caused offence to the godly."
>
> Objection III: "You should take more leisure, and take other mens judgement of your Writings before you thrust them out so hastily."[45]

In response, I can do no better than to close with Baxter's summary comments. Indeed, if I were to issue a challenge to the critics of me in particular and Christian Reconstruction in general, this would be it:

> In summ, to my quarrelsome Brethren I have two requests, 1. That instead of their unconscionable, and yet unreformed custome of backbiting, they would tell me to my face of my offences by convincing evidence, and not tempt the hearers to think them envious: and 2. That what I do amiss, they would do better: and not be such as will neither laboriously serve the Church themselves, not suffer others: and that they will not be guilty of Idleness themselves, nor tempt me to be a slothful servant, who have so little time to spend: For I dare not stand before God under that guilt: And that they will not joyn with the enemies and resisters of the publication of the Word of God.
>
> And to the Readers my request is, 1. That whatever for Quantity or Quality in this Book is an impediment to their regular universal obedience, and to a truly holy life, they would neglect and cast away: 2. But that which is truly Instructing and Helpful, they would diligently Digest and Practice; And I encourage them by my testimony, that by long experience I am assured, that this PRACTICAL RELIGION will afford both to Church, State and Conscience, more certain and more solid Peace, than contending Disputers, with all their pretences of Orthodoxness and Zeal against Errors for the Truth, will ever bring, or did ever attain to.

45. Richard Baxter, *A Christian Directory: Or, A Summ of Practical Theologie, and Cases of Conscience* (London: Robert White for Nevil Simmons, [1673] 1678), unnumbered pages, in Advertisements.

I crave your pardon for this long Apology: It is an Age where the Objections are not feigned, and where our greatest and most costly services of God, are charged on us as our greatest sins; and where at once I am accused of Conscience for doing no more, and of men for doing so much: Being really

A most unworthy Servant of so good a Master.

31

SERVITUDE, PROTECTION, AND MARRIAGE

If thou buy an Hebrew servant, six years he shall serve: and in the seventh he shall go out free for nothing. If he came in by himself, he shall go out by himself: if he were married, then his wife shall go out with him. If his master have [has] given him a wife, and she have born him sons or daughters; the wife and her children shall be her master's, and he shall go out by himself.

EXODUS 21:2–4

It is a wise course to begin any discussion of the case laws of Exodus by pointing out that these laws are best understood theocentrically. God's relationship to man is the focus of many of these case laws, especially those involving slavery and marriage. The basic theme of this passage in Exodus is *protection through covenantal subordination*.[1] A secondary theme, closely related to the first, is the *right of redemption* (buying back). These are fundamental themes in the Book of Exodus specifically and in the Bible generally. God delivers His bride from bondage in the household of a foreign master who has kept her in illegal slavery—slavery without the right of redemption. The pharaohs of the Mosaic period had attempted to do what the Pharaoh of Abram's day had attempted. Like Jacob, Abram had journeyed to Egypt in the midst of a famine (Gen. 12:10). As Abram had expected, Pharaoh captured Abram's bride, Sarai, and brought her to his house (v. 15). God then sent plagues against Pharaoh's household (v. 17). The Pharaoh of Moses's infancy instructed the Hebrew midwives to kill all the

1. On the hierarchical nature of God's covenant, see Ray R. Sutton, *That You May Prosper: Dominion By Covenant*, 2nd ed. (Tyler, Texas: Institute for Christian Economics, [1987] 1992), ch. 2. Cf. Gary North, *Unconditional Surrender: God's Program for Victory*, 5th ed. (Powder Springs, Georgia: American Vision, [1980] 2010), ch. 2.

male infants but allow the females to live (Ex. 1:16). It is obvious what he intended: the capture of God's bride.

A. Indentured Servitude

Exodus 21:2–4 presents the case law governing indentured servant marriages. God had just delivered a slave people out of bondage. He had removed them from the visible tyranny of Egypt, and He was preparing them for long-term service to Him in the Promised Land. It was not that servitude was being abolished; it was rather that a new Master had appeared on the historical scene. God had delivered them out of Pharaoh's household as intact families. He was now bringing them into His household as His servants. He was making Israel His bride.

The maximum legal period of the most rigorous form of non-criminal indentured servitude in Israel was a little over six years. This was the form of servitude in which the master had the right of corporal punishment, and the form in which the servant had to be provided with capital upon his release. At the beginning of the seventh year, sometimes called the *sabbatical year* by Bible commentators, these servants went free in Israel, and simultaneously all zero-interest charitable debts were cancelled (Deut. 15:1–6).[2] Not all debts were cancelled; just the charitable loans which were morally required by God (Deut. 15:9–10). It is noteworthy that the year of release was also the year when the law was read to the assembled nation at the feast of tabernacles (Deut. 31:10–13).[3] God's law is to be understood as the means to freedom for those who obey it.[4]

2. Gary North, *Inheritance and Dominion: An Economic Commentary on Deuteronomy*, 2nd ed. (Dallas, Georgia: Point Five Press, [1999] 2012), ch. 36.

3. *Ibid.*, ch. 75.

4. I should mention here that the Jewish scholar Maimonides asserted in 1180 A.D. that a Hebrew can legitimately sell himself to another Hebrew for more than six years, but not beyond the jubilee year. Moses Maimonides, *The Book of Acquisition*, vol. 12 of *The Code of Maimonides*, 14 vols. (New Haven, Connecticut: Yale University Press, 1951), "Treatise V, Laws Concerning Slaves," V:II:3, p. 250. On the other hand, if the court sells him into servitude, which Maimonides said can only take place because the man is a thief who cannot afford to make restitution (V:I:1, p. 246), he can be required to work only six years (V:II:2, p. 249). I argue that a criminal who is sold to repay his victims can be enslaved permanently if that period is that is what it takes to raise enough money to repay his victims. A major problem with the *Code* is its sparse or absent arguments and explanations for controversial assertions. In reading the *Code*, we must remember that Maimonides distinguished between a code and a commentary: "In a monolithic code, only the correct subject matter is recorded, without any questions, without answers, and without any proofs, in the way which Rabbi Judah adopted when he composed the Mishnah." A commentary records opinions, debates,

In the national seventh year, these full-scale bondservants went free.[5] Why the statutory limitation? Probably because this sabbatical week of years pointed back to the symbolic work week that God imposed on man because of his sin. Adam had originally been given a one-six work week, with the first day as his day of rest. He sinned, seeking autonomy, and was then cursed by God with a six-one work week: six days of labor, with the promise of release and rest only at the end.[6] This new weekly structure was a curse on man, although a curse with the grace of sabbatical liberation promised at the end of the week's period of servitude. Thus, man's position as a *debtor to God* is manifested in the sabbatical-year system of debt and slavery. God offers covenant-breaking man a means of escaping his debt: faithful labor as a bondservant for a specified period.

B. Marriage and Servitude

Verse three is clear: a married man who goes into indentured servitude, probably because of debt,[7] takes his wife with him. She therefore departs with him when he goes out. Verse four is the difficult section for moralists. If he had been given a wife during his period of servitude, she and their children must remain behind with the master when the husband leaves.

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and identifies sources and persons, he said: letter to Rabbi Phinehas ben Meshullam, judge in Alexandria: reproduced in Isadore Twersky, *Introduction to the Code of Maimonides (Mishneh Torah)* (New Haven, Connecticut: Yale University Press, 1980), p. 33. The Code was basic to Maimonides' thinking. Twersky wrote: "The *Mishneh Torah* also becomes an Archimedean fulcrum in the sense that he regularly mentions it and refers correspondents and inquirers to it. The repeated references convey the impression that he wanted to establish it as a standard manual, a ready, steady, and uniform reference book for practically all issues" (p. 18).

5. This was not true of those who had indentured themselves to other Hebrews as permanent hired hands (Lev. 25:25–28), or those who had indentured themselves to resident aliens (Lev. 25:47–54).

6. Gary North, *Sovereignty and Dominion: An Economic Commentary on Genesis* (Dallas, Georgia: Point Five Press, [1982] 2012), ch. 6.

7. Maimonides declared without argument or biblical citation that "One is not permitted to sell himself into servitude and lay the money away or buy merchandise or vessels with it or give it to a creditor. He can sell himself only if he needs the money for food and only after he has nothing left in the house, not even a garment." *Acquisition*, V:I:1, p. 246. The problem here is that it seems inconceivable that a man could be placed in servitude for over six years in order to raise enough money for his family's food. It seems far more plausible to believe that he was forced into servitude because of debts amassed over a lengthy period. Maimonides did say that the state may legitimately sell a man into bondage to someone who pays the man's unpaid taxes for him: *ibid.*, V:I:8, p. 248. Since he had already argued that the state can sell someone into slavery only for theft, he must have believed that the failure to pay a tax must be a form of theft.

The key question we need to ask ourselves is this: Where had the indentured servant received his wife if he originally brought her into the master's household? The answer is crucial to understanding this passage: *from her father*. He would have had to pay a *bride price* to her father, thereby indicating his economic productivity, or at least his position as a man possessing inherited capital.[8] The bridegroom's payment of a required bride price is the key to understanding this case law.[9]

1. To Give a Wife

Jacob wanted to marry Rachel. He had no visible, transferable capital, for he was a fugitive, even though he had received Isaac's blessing. Without an assured inheritance, he had to pay Laban a bride price. That bride price was seven years of labor: "And Jacob served seven years for Rachel" (Gen. 29:20a). His words are significant: "Give me my wife, for my days are fulfilled" (Gen. 29:21a). *Give me my wife*, he insisted. The father had to *give* his daughter to the bridegroom, once he had met the terms of the bride price. Rachel now *belonged* to Jacob. He had paid the price.[10]

Exodus 21:4 reads: "If his master have given him a wife, and she have born him sons or daughters; the wife and her children shall be her master's, and he shall go out by himself." The language is the same as Jacob's to Laban: He has given her to him. This raises a second crucial question: Where did the master get a woman for his servant in order to be able to give her to him in marriage? Either she was a servant already owned by the master, or else she had been purchased by the master for the servant. Perhaps she had been some other fam-

8. The bride price would normally have been less than 50 shekels of silver. A man who seduced an unbetrothed virgin was required by law to pay 50 shekels to her father and then marry her, with no future right of divorce (Deut. 22:28–29). Additional evidence of this 50-shekel maximum: the bridegroom who falsely accused a new bride of not being a virgin at the time of their marriage, and who could not prove his accusation, had to pay 100 shekels of silver to her father (Deut. 22:19). This was double restitution: two times 50. On these points, see chapter 47, "Seduction and Servitude."

9. Chapter 32.

10. This is the covenantal basis of Jesus Christ's exclusive lifetime (eternal) ownership of His bride, the church (Eph. 5:22–24). The church is a true bride, not a concubine. A concubine in Israel was a wife who possessed no dowry. No bride price was paid for her, and no dowry was brought into the marriage by her. Legally, had Christ not died for the church, the church would be a concubine—a second-rate wife. This is why the church knows that she will never be divorced. This is why Paul could ask rhetorically: "Who shall separate us from the love of Christ?" (Rom. 8:35a). Christ paid the required bride price to the Father. The church is not a concubine, even though she brings neither virginity nor dowry into the marriage. The bride price was paid by Christ at Calvary.

ily's servant. Perhaps she had been the daughter of a free man. The point is, the master now lawfully controls her as a lawful father. He can therefore give her to his servant.

If she had been the daughter of a free man, then the master would have had to pay a bride price to her father. This assured the father that the man who was taking *legal authority over his daughter* was competent financially. The father had been given economic evidence that the requested transfer of authority over his daughter to another man posed no threat to her economic future. The bride price served as evidence of her future husband's ability to support her; as a weaker vessel, she was legally entitled to such support.

If the master paid the bride price, and her father transferred to him the right to give her in marriage, then the master became her new father, *covenantally* speaking. He would remain legally responsible for her until she married a legally independent man. The master had the legal right to give her as a wife to a servant in his household, but only because she would remain in his household. He could not legally transfer to a servant the economic obligation to support her, for *the servant was not a covenantally free agent*, either economically or legally. Because the servant possessed no capital, the master remained her father covenantally until such time as the servant purchased her from him, that is, *until he paid the master the bride price owed to a father*.

This law provided additional assurance to the woman's natural father of the lifetime economic protection owed to his daughter. The master did not have the legal authority to transfer this economic responsibility to a former indentured servant until the latter had proven that he was able to pay the same bride price originally owed to the father. If this law had not been in existence, or if it was unenforced by civil law, then there would be no guarantee to the woman's natural father that the master would not later decide to escape his economic liabilities to the woman by transferring such responsibility to a former indentured servant who had not yet demonstrated his economic competence. The legal requirement that the released servant pay the master the bride price before his wife could leave the household of the master was the natural father's assurance of her continuing protection.

The modern world has pretended that it can somehow ignore the economic aspects of marriage. People assume that the ancient world was primitive,[11] and therefore the attention given by ancient law codes

11. Harry Emerson Fosdick, a liberal theologian and an immensely popular preacher for several decades, wrote: "We know now that every idea in the Bible started from

to such matters as dowries and bride price payments is evidence of this primitivism.[12] But it is the modern world that is primitive, for it has abandoned a covenantal view of marriage, and has substituted easily broken mutual contracts, where fathers have no responsibilities to investigate the economic competence of prospective sons-in-law, and wives have little legal protection from the courts if husbands decide to break their marriage contracts.[13] Women have become the economic victims of divorce.

2. The Family as the Primary Protection Agency

Marriage is not lawless. It is a covenantal institution.[14] It is the primary training ground for the next generation. It is the primary institution for welfare: care of the young, care of the aged, and education. It is the primary agency of economic inheritance. *The family is therefore the primary institutional arrangement for fulfilling the terms of the dominion covenant* (Gen. 1:27–28). God honored this crucial dominion function of the family by placing restrictions on it. A servant is expected to defer marriage until he is an independent man. Later, as a husband in a position of authority, he can exercise dominion under God as the head of his family. The model here is Jacob (Gen. 29:20).

Both marriage and labor are normally to be part of the domin-

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primitive and childlike origins. . . .” *The Modern Use of the Bible* (New York: Macmillan, 1941), p. 11. See also Henry Schaeffer, *The Social Legislation of the Primitive Semites* (New Haven, Connecticut: Yale University Press, 1915). He began with a consideration of Hebrew marriage. He argued that “the matriarchal clan was the dominant form of social organization prior to the settlement in Canaan” (p. 7). It is astounding the lengths to which people will go to escape the Bible’s testimony concerning God and man.

12. The Hammurabi Code devoted considerable space to these matters, paragraphs 128–84. *Ancient Near Eastern Texts Relating to the Old Testament*, ed. James Pritchard, 3rd ed. (Princeton, New Jersey: Princeton University Press, 1969), pp. 171–74. Not equally detailed are the laws of Eshnunna, paragraphs 17–28: *ibid.*, p. 162; the Middle Assyrian laws, paragraphs 25–48: *ibid.*, pp. 182–84; and the Hittite laws, paragraphs 26–36: *ibid.*, p. 190.

13. In Victorian England, custody of the children automatically went to the divorced husband. This reduced the incentive for divorce on both sides. The husband feared the responsibility of taking care of the children, and the wife did not want to abandon them. As William Tucker commented: “The Victorian system favored neither men nor women: It favored families. . . . They loaded the system against the individual interests of men and women to keep both committed to the family.” Only after 1910 did social workers and the courts shift the balance and begin to grant mothers automatic custody of the children. William Tucker, “Victorian Savvy,” *New York Times* (June 26, 1983). The biblical approach is different: children go to the innocent victim of the sinning marriage partner.

14. Sutton, *That You May Prosper*, ch. 8. The code of Hammurabi specified that an aristocrat who acquired a wife without contracts for her did not have a wife: paragraph 128. *Ancient Near Eastern Texts*, p. 171.

ion covenant between man and God. Because the servant's dominion over his assigned portion of the earth is not independent of his master's authority, his authority over a wife taken during his term of service is also under his master's authority. There is a *human mediator* between God and the servant: *the master*. Therefore, it is the master, not the servant, who is directly responsible to God for the general care of the servant's wife. The servant takes orders from the master.[15]

The servant's protection comes from the master. The capital at his disposal comes from his master. He takes orders directly from his master or a representative of the master. If he is a foreman himself, he issues orders only as a representative of his master, because he is acting as an official under the master's general authority. The master is responsible before God for any delegation of authority to a servant, so the mediatorial position of the master is not abrogated simply because he turns limited authority over to the servant.

This law made it clear to any woman who married a Hebrew indentured servant that *the ultimate human authority over her*, and therefore her legal protector, was not her husband but rather *her husband's master*. She was fulfilling the terms of the dominion covenant as a wife within a family unit, but the head of her family was her husband's master. Her husband was therefore only a *representative* of the head of her family. The covenant of marriage was in this instance four-way: (1) God, (2) the master of the house, (3) the indentured servant, and (4) the servant's wife. Because the protection of the wife and children was ultimately the legal responsibility of the master, the servant's wife and the children remained with the master when the husband, now released, departed.

The existence of such a law regarding servant families testifies to the importance of protection for a wife. Economic protection is one of the reasons why a woman marries. If the source of her financial protection is divided, then she faces dual loyalties. The problem of serving two masters arises. Which man possesses authority over her? If the master commands her husband, then her covenantal obligations to both men are unclear. This law forces the couple to recognize her ambiguous position as someone who owes loyalty to two men

15. A modern application of this biblical principle would be that a wife should remain a member of the Bible-believing church she is covenanted to even if her husband leaves the church and joins a more liberal church, let alone an apostate church. Her spiritual covering is provided by the church, mediated through her husband. Even though he has removed himself from the church's covering for the family, she is still entitled to it.

in the same household. This is a very difficult kind of in-law problem. The covenantal father-in-law actually owns the services of his covenantal son-in-law for a number of years, and literally owns his covenantal daughter until the servant becomes a free man and subsequently presents him with the bride price.

3. Counting the Costs

This law also forces both the servant and his prospective wife to consider carefully the costs, risks, and responsibilities of marriage. The husband's need for money to pay her bride price will remain a problem for them long after he regains his freedom. She may wind up with a part-time husband, should he decide to accept his independence and leave her behind. In this case, her master will become her day-to-day lord, unless her husband returns, either to buy her freedom or to become a permanent servant. Marriage to a man in bondage should not be entered into lightly. By asking her to marry him, the servant is asking her to subject herself to the covenantal authority of his master. A servant who married a woman was, in effect, acting as an agent of his master. The law testifies to her position of servitude as the wife of a servant. She might never be able escape this bondage. We can assume that the only woman ready to accept such bondage would be a household servant or the daughter of a poverty-stricken family (cf. Ex. 21:9).

Similarly, the servant has to consider the potential costs of marriage during his period of bondage. He may not be able to afford to redeem her and the children. In this case, he will face either a life of servitude or a life without his family. A future-oriented man probably would prefer to wait a few years, working out his term of service before bringing a woman into covenantal servitude under his master. By delaying marriage, he can then insure freedom for his future family. *Is freedom worth the delay*? This is the question facing a servant who is considering marriage. It is also the question facing his prospective bride.

Jacob's seven years of service for a wife had to be completed prior to his marriage. Similarly, a Hebrew bondservant, if he came into bondage as a single man, was expected to remain single throughout his term of service. He was under another man's administration, and he was therefore less able to fulfill the terms of the dominion covenant on his own initiative.

What about an indentured servant's children? The law did not permit law-abiding Hebrews to become involuntary lifetime servants to

other Hebrews. A Hebrew could serve another Hebrew or a resident alien for up to 49 years, and he could become a member of the household through the pierced ear ritual, but nothing is said about the bondservant's children. Nothing needed to be said; the decision to become a servant, or even enforced servitude to repay a debt or make restitution, did not bind a man's children beyond the age of their maturity, for they were not permitted to be enslaved without their consent. Thus, it should be clear that the children of the released manservant, upon marriage for daughters or upon reaching the age of 20 for sons (Ex. 30:14), would have gone free. Presumably, an unmarried daughter who reached age 20 would have returned to her father's house or to her oldest brother's house, unless she, too, chose to become a lifetime servant in the master's house. Adult children no longer would have been in need of the legal protection of the master.

The wife, having married in terms of the servant status of her husband, in effect had already become *a voluntary lifetime servant to the master*, unless her husband came and redeemed her. Either she served her husband or her husband's former master, who remained her covenantal father until the bride price was paid.

The question arises, did the master own her future productivity, or did it belong to her husband? Maimonides wrote: "Though the master must support the wife and the children of his slave he is not entitled to the proceeds of their work. Rather do the proceeds of the wife's work and the things she finds belong to her husband."[16] Then what would be the economic incentive for a master to give the wife to the bondservant? He does not escape the legal and economic responsibilities of supporting her, yet he loses her productivity, which is transferred to the bondservant. Only if the master could escape the costs of supporting her would such a transaction have made sense. But the whole justification of this law regarding wives of bondservants is that *it was the master's status as the provider of her protection* that made it mandatory that she and the children remain with him upon her husband's departure. Because the responsibilities associated with marriage would be a spur to the bondservant's productivity, marriage was also an incentive to liberty. Thus, contrary to Maimonides, it is difficult to imagine that the Bible would have created an economic disincentive for the master to provide his bondservant with a wife. He retained a portion of her productivity, and the productivity of any children born of the union, until the bondservant could afford to redeem her.

16. Maimonides, *Acquisition*, "Slave Laws," V:III:2, p. 254.

C. The Release Price

There were two ways of reuniting a broken Hebrew servant family. First, the servant could voluntarily become a lifetime servant. The sign of his bondage as an *adopted* household servant was a pierced ear (Ex. 21:6). This legal position as an adopted son would have been in effect until the jubilee year, when he would have returned as a free man to take possession of his family's inheritance in the land (unless he inherited land in his adoptive father's legacy[17]). Second, he could go out as a free man, returning intermittently for visitation rights with his wife, until such time as he earned funds to purchase his wife and children.

1. The Right of Redemption

Understand, however, that no biblical text explicitly specifies this right of redemption by the husband if the wife was owned by a Hebrew master. Nevertheless, such a legal right is an inescapable conclusion of Exodus 21:7–8: "And if a man sell his daughter to be a maidservant, she shall not go out as the menservants do. If she please not her master, who hath betrothed her to himself, then shall he let her be redeemed: to sell her unto a strange nation he shall have no power, seeing he hath dealt deceitfully with her." The Hebrew daughter could be bought and sold as the Hebrew manservant could be. She could become a maidservant (Deut. 15:12). She could also be purchased by means of a *bride price*, that is, to become a wife. Her father could not legally abolish the God-given judicial, covenantal office of father; he could only transfer this office to another man who was promising to become her future husband or her future father-in-law. This transfer of office was legally possible only because *marriage is judicially a form of adoption*.[18]

We know this must have been the case, because of the laws governing vows. A woman could take a vow, but the male head of household, father or husband, had to affirm it within 24 hours in order for

17. Hebrew rabbis agreed that the word "forever" in Exodus 21:6 referred to the period remaining until the jubilee, said the medieval Jewish commentator, Rabbi Moshe ben Nachman (Ramban), *Commentary on the Torah: Exodus* (New York: Shilo, [1250s?] 1973), pp. 348–49: Ex. 21:6. We do not know exactly when Nachmanides wrote this section; he did not complete his commentary on the Pentateuch until his arrival in Jerusalem in 1267. Charles B. Chavel, *RAMBAN: His Life and Teachings* (New York: Philipp Feldheim, 1960), p. 44. He died sometime around 1270, although the date of his death is not known: *ibid.*, p. 66. On "forever," see also Maimonides, *Acquisition*, "Slave Laws," V:III:7, p. 255.

18. Chapter 32:B.

it to be judicially binding before God (Num. 30:3–14).[19] This law appears, appropriately, in the Book of Numbers, the book corresponding to point four of the covenant: oath. Only a widow could make a judicially binding oath on her own (Num. 30:9). This indicates that a woman, unless a widow, was always legally under the hierarchical rule of a man. She was under a man's judicial authority: the office of household head. This office could not be transferred except through adoption or temporary maidservice. (A daughter could be used as collateral for a charity loan. A minor son could be, too, which is why the widow approached Elisha when the creditor threatened to make her sons into bondservants [II Kings 4]. Elisha did not say that the creditor had broken the law. Instead, as her mediatory kinsman-redeemer [her pastor], he provided a miracle for this widow: oil that could be sold in order to redeem the debt.)

2. Daube's Hermeneutics: From Law to Theology

The prominent Old Testament scholar David Daube went so far as to argue that the original right of self-redemption by the Hebrew bondservant was strictly limited to cases of ownership of Hebrews by resident aliens.[20] Daube self-consciously preferred to argue from the legal to the theological,[21] but he then failed to deal with the actual judicial standards regarding redemption. This is why we need to argue theologically as well as judicially; otherwise, we will miss important aspects of both the theological and judicial character of God's revelation. Daube's hostility to theology was so great that he argued that the priests and prophets who supposedly wrote the Pentateuch in the eighth century B.C. (or later) actually invented the idea of God's liberating His people from guilt.[22] Again, he was arguing from the judicial to the theological: a view based on the prior exclusively judicial concept of God as the liberator from physical bondage (the exodus), which in turn was based on the idea of His liberating His people from debt servitude and economic oppression.[23] He refused

19. Gary North, *Sanctions and Dominion: An Economic Commentary on Numbers*, 2nd ed. (Dallas, Georgia: Point Five Press, [1997] 2012), ch. 16.

20. David Daube, *Studies in Biblical Law* (Cambridge: At the University Press, 1947), p. 43.

21. *Ibid.*, pp. 1–3, 43.

22. Appendix P, "The Hoax of Higher Criticism."

23. *Ibid.*, pp. 55–56. He wrote: "The result that I wish to stress is that the idea of God or Jesus redeeming mankind from sin and damnation, apparently a purely religious idea, derives from those ancient rules of insolvent debtors and victims of murder, on the preservation of existing clans and the patrimony of clans." *Ibid.*, p. 59.

to acknowledge that liberation from debt, economic oppression, and slavery was first and foremost God's liberation of His people from sin and idolatry. Again, we see a refusal to accept the existence of the Bible-revealed relationship between covenant-breaking and God's negative sanctions in history.

In contrast to Daube, I am arguing from the theological to the legal. *We need to explain the Bible's legal texts by analyzing them in terms of the covenant. Covenant theology always governs biblical laws.* The legal right of redemption from bondservitude through offering a purchase price is implied throughout the Bible because of biblical religion's equating of personal freedom, economic success, and ethical obedience to God. The biblical theme of national and personal liberation is always grounded in the general commandment of liberation from the bondage of sin. The focus of biblical law is primarily *ethical* rather than primarily legal, primarily economic, or primarily political.

3. Covenant-Keeping and Prosperity

If a man is economically unskilled, his incompetence is expected to lead him into poverty. This, in turn, tends to lead him into bondservice, where he can learn the biblical law of liberty—obedience to God—through obedience to a covenantally self-disciplined person. Why is it assumed in the Mosaic law that the owner of a bondservant is covenantally faithful? Obviously, because he had sufficient wealth to purchase the bondservant. Immoral and incompetent men do not gain *and maintain* control over riches in a commonwealth governed by biblical law (Deut. 28:15–68). This case law rests on the presupposition of a statistically relevant link between covenant-keeping and long-term personal prosperity.

Because ethical behavior is best learned under a covenant-keeping Hebrew master rather than under a covenant-breaking resident alien, the preferred form of servitude is Hebrew over Hebrew. Thus, contrary to Daube, the law regarding the redemption price would have been applied in cases of Hebrew household bondservice, and not just in cases of ownership by resident aliens. When the bondservant's incompetence is overcome, first by the master and then by himself, he is to be freed upon payment of the redemption price. He is expected to be able to earn the purchase price through faithful service. Here is the ethics-capital link in operation once again. The Bible recommends faithfulness, prosperity, and legal freedom. The Bible teaches that personal responsibility before God is enhanced by a person's le-

gal status as a free man. This is why Paul wtote that Christian slaves should accept freedom if it is made available to them (I Cor. 7:21).[24]

D. Will Taxpayers Be Enslaved?

There are cases where righteous people fall into poverty or trials through no fault of their own. In order to give them a way back into profitable service as debt-free producers, God makes indentured servitude available to them. It is God's means of grace to them, a means of release from debt bondage. It is clear that the society at large is not supposed to become burdened with extra taxes in order to care for such people. Despite the fact that they may have come into hard times through no fault of their own, *bondservice is still a Bible-sanctioned remedy for poverty*. The society at large is presumed to be unable to sort out judicially on a case-by-case basis the righteous poor from the unrighteous poor. Thus, the same remedy for both is established by biblical law: indentured servitude. The poor man is expected to bear the unpleasant burden of becoming a bondservant as the means of his restoration economically. The taxpayers are not to become his servants. *A welfare state cannot develop when the biblical laws of servitude are honored*.

In modern societies where these laws are not honored, *the enslavement of taxpayers to the economically incompetent* has become the political norm. Debt is seen as a blessing, bondservitude as a cursing, and theft by the ballot box as liberation. The welfare state does puts legally innocent, economically competent people into servitude to the economically incompetent. Nevertheless, Christian voters voluntarily resort to ballot-box coercion to care for their own parents (compulsory old age support programs), as well as the distant poor. This testifies to the almost universal spread of antinomianism in our day. When a welfare state goes bankrupt, there are not enough rich people to pay the enormous debts. Its unproductive and economically dependent creditors find themselves facing disaster. Bankruptcy cannot be avoided; it can only be deferred by transferring it to others. The bills eventually come due.

E. Prosperity Is Both the Standard and Goal

The biblical economic standard for a righteous person, as with a nation or other covenantally bound groups, is prosperity.[25] Thus, the

24. Gary North, *Judgment and Dominion: An Economic Commentary on First Corinthians*, 2nd ed. (Dallas, Georgia: Point Five Press, [2001] 2012), ch. 8.

25. David Chilton, *Productive Christians in an Age of Guilt-Manipulators: A Biblical Re-*

man who has fallen into poverty needs guidance from someone who is more skilled economically. There is presumably some flaw in the poor man's character or abilities that needs correction.

A physical or other catastrophe may also be the cause of the man's poverty, but the case law's provisions do not differentiate among the causes. The concern of biblical law is moral rehabilitation, which is then to lead to economic rehabilitation, or perhaps vice versa. The two forms of rehabilitation are assumed by the Bible to be connected.

Household servitude is a means of deliverance from bad habits based on personal character flaws. It is the bankrupt person's first step to personal economic liberation. The case of a convicted thief who is sold into slavery to raise the funds to make restitution to his victims is an even more obvious example of being a slave to sin. Servitude is a means of progressive release for him. He is already in bondage to sin; *bondservice in a righteous household is the first step in his redemption out of slavery*.

1. Hostility to Covenantal Sanctions

The suggestion of any links in history between covenantal faithfulness under God and personal liberty, personal responsibility, and personal economic success is unacceptable to modern political liberals, including the vast majority of today's secular university-trained Christian social theorists. They implicitly understand that if such a covenantal relationship really exists, then biblical religion promotes the idea of the free market society, where individuals are to be held legally and economically responsible for their own mistakes. If the biblical covenant really does establish this connection, then any society that is faithful to the terms of God's covenant, meaning biblical law, will eventually become capitalist. There are few ideas more repugnant to the modern, liberal-minded, humanist-educated Christian social thinker. The Book of Deuteronomy, especially chapter 28, is the great offense, the great stumbling stone, for Christian political liberals.[26]

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sponse to Ronald J. Sider, 4th ed. (Tyler, Texas: Institute for Christian Economics, [1981] 1996).

26. It was not an accident that William E. Diehl, a self-professed Keynesian, was so offended by my presentation of the biblical case for the free market economy. What really offended him was the Old Testament. He wrote: "That the author is strong on 'biblical law' is apparent. [What is also apparent is Diehl's hostility to biblical law: he placed the phrase in quotation marks, as if Old Testament law were not really biblical law—G.N.] The essay provides us with thirty-nine Old Testament citations, of which thirty-three are from the book of Deuteronomy. . . . [T]his essay might more properly be entitled, 'Poverty and Wealth according to Deuteronomy.'" Diehl, "A Guided-Market

On the other hand, dispensational fundamentalists' hostility to the idea of the continuing authority of Old Testament law makes it virtually impossible for them to present a specifically biblical-exegetical case for the free market economy, despite the fact that their instincts are generally conservative politically.

If this relationship between covenant-keeping and visible prosperity is denied, and poverty is not seen as statistically and covenantally correlated to ethical disobedience and a lack of self-discipline, then Old Testament servitude makes no ethical sense. Why should a man be put into legal bondage just because "random" events made him poor? If people's condition of poverty is in no statistically relevant way connected to their ethical condition, and if other people's condition of prosperity is in no statistically relevant way connected to their ethical condition, then indentured servitude, let alone intergenerational slavery, is ethically monstrous. This is exactly what modern liberal commentators say, *because above all they hate the idea of God's covenant sanctions in history*.

It is not random that the rise of Unitarianism (which tended to be deistic) and then Transcendentalism (which tended to be pantheistic) in New England were closely connected with the rise of abolitionism, 1820–1860.[27] What was common to both theological movements was a philosophy of *cosmic impersonalism*. Both theological systems were inherently anti-Christian and anti-covenantal. A representative statement of this anti-covenantal theology is provided by Unitarian Octavius Brooks Frothingham in his aptly titled book, *The Religion of Humanity* (1875): "The first sin was the first triumph of virtue. The fall was the first step forward. The advent of evil was the dawn of intelligence, discernment, enterprise, aspiration. Eden was the scene of humanity's birth. The tempter was Lucifer—the bringer of light. Thus even in him is something prophetic of salvation. The fault of Adam was disobedience to spoken law; but disobedience to arbitrary spoken decree, to unreasoning command, what is that but in essence obedience to the unspoken command of intelligence, and what is that but the soul of goodness?"[28] That which God is not allowed to do

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Response," in Robert G. Clouse (ed.), *Wealth and Poverty: Four Christian Views* (Downers Grove, Illinois: InterVarsity Press, 1984), p. 66.

27. C. Gregg Singer, *A Theological Interpretation of American History* (Nutley, New Jersey: Craig Press, 1964), ch. 2; R. J. Rushdoony, *The Nature of the American System* (Vallecito, California: Ross House, [1965] 2002), ch. 6.

28. Octavius Brooks Frothingham, *The Religion of Humanity* (New York: Putnam's, 1875), pp. 299–300; cited in Rushdoony, *Nature of the American System*, p. 89.

in history in His name—impose covenantal sanctions—the state was expected to do in the name of universal humanity.[29]

The black slave became a tool in the statist plans of the North's Republican politicians. Congressman William D. ("Pig Iron") Kelley of Pennsylvania announced this messianic humanist vision: "Yes, sneer at or doubt it as you may, the negro is the 'coming man' for whom we have waited."[30] Frothingham recalled in 1875 the messianic viewpoint of his theological peers during the Civil War (1861–65): "The army of the North was to them the church militant; the leader of the army was the avenging Lord; and the reconstruction of a new order, on the basis of freedom for mankind, was the first installment of the Messianic Kingdom."[31] What should have been a biblical moral crusade against illegitimate lifetime chattel slavery became a humanist moral crusade against all forms of private, profit-seeking servitude. The result in the twentieth century was the advancement of universal servitude to the state.

2. Protecting the Weak

The wife and children needed lawful protection. They retained their lawful protection, either from the master or from an industrious, now future-oriented former bondservant, whether we are speaking of voluntary permanent servitude of the ex-bondservant husband or their purchase by him through the payment of a redemption price. But the husband would probably have retained little capital after having paid to buy freedom for his family. Nevertheless, his *time orientation and demonstrated industriousness* were paramount for the subsequent protection of his family, not his remaining accumulated savings. This was also true, of course, with the bride price. A young man would probably have to give most of his capital to his father-in-law at the time of the marriage, although the father-in-law probably would have passed these assets to his daughter as her permanent dowry, in lieu of her inheritance of a portion of her family's land.[32]

Economically speaking, a master who wanted the lifetime services of a man had an incentive to find a man with a short-run time perspective to serve him. He might be able to persuade him to get mar-

29. See especially the book by Unitarian Moncure D. Conway, *The Rejected Stone; or, Insurrection vs. Resurrection in America* (Boston: Walker, Wise, 1862).

30. *The Old Guard*, vol. I, no. IX (Sept. 1863), p. 240; cited in Rushdoony, *Nature of the American System*, p. 83.

31. Frothingham, *Religion of Humanity*, p. 20; cited in Rushdoony, *idem*.

32. Chapter 32:B.

ried during his period of service. That way, the master would have gained the woman as a lifetime servant, or both of them as lifetime servants, or the bride price. But, in doing this, he risked having to take responsibility for servants with short-run outlooks, both husband and wife. He had no choice about accepting the servant as a lifetime servant; that decision was exclusively the servant's. As Mendelsohn pointed out, it was probably less expensive to hire workers part-time as needed than to buy someone's lifetime services.[33]

This law does not provide specific details about the redemption of a servant wife and children from a master. What would he have had to pay to free them? We might look at the entry prices governing adoption into the Mosaic priesthood. The woman's price was 30 shekels of silver (Lev. 27:4). The restitution payment for a male or female servant killed by a goring ox was also 30 shekels (Ex. 21:32).[34] On the other hand, the compulsory bride price owed to the father of a seduced virgin was 50 shekels of silver (Deut. 22:29). It seems more likely that the price would be the bride price paid by the master to the woman's father.

If the bride price was normally 50 shekels of silver, and the market price of a female servant fluctuated, the servant-master would have been careful not to overpay. He would have preferred to buy a woman in the open market for less than 50 shekels. The servant might also have asked for a wife from the master's household servants, although the number of these servants was probably small in any household, as Mendelsohn's study indicates.[35] The servant probably would not have had many opportunities to meet girls outside this narrow household circle. He would have been dependent to a great extent on the servant-master's ability and willingness to locate a bride for him, unless he knew the prospective bride before he became a servant.

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33. Isaac Mendelsohn, *Slavery In the Ancient Near East* (New York: Oxford University Press, 1949), p. 119.

34. Children adopted into a priestly family, from five years old to age 20, required an entry price of 20 shekels for boys and 10 for girls. For young children, a month to five years old, it was five shekels and three shekels (Lev. 27:5–6). Gary North, *Boundaries and Dominion: An Economic Commentary on Leviticus*, 2nd ed. (Dallas, Georgia: Point Five Press, [1994] 2012), ch. 35. I presume, however, that no payment would have been required to redeem children, since the master controlled them only as a covenantal grandfather, not as an owner. With the restoration of the covenantally independent family unit, the children would have gone out with their parents. If this was not the rule, and he had to buy his children, then with the birth of every child, the former servant would have been penalized. It is not likely that such a penalty would have been in force in a society designed by a God who favors population growth.

35. Mendelsohn, *Slavery In the Ancient Near East*, p. 121.

Why was the master entitled to payment from the former servant? *Because he was still covenantally the wife's father*. The man who gives a woman to another man to become his wife is covenantally her father. He was therefore entitled to a bride price—evidence that she will be protected in the new household.[36] The servant had taken the wife in advance, just as Jacob took Rachel after the switch had been made, and he owed the servant-master the required payment. In Jacob's case, the agreed-upon price was another seven years of service (Gen. 29:27–30).

How do we know that the husband would have been permitted to buy his family out of servitude? Because of the office of kinsman-redeemer. We know that the kinsman-redeemer was assigned the responsibility of buying his near-kinsman out of servitude to a stranger (Lev. 25:47–50). We know that the freed husband would have been his wife's kinsman-redeemer, as nearest of kin.

Normally, buying a wife out of servitude would have meant that the ex-servant had to earn these assets personally, unless his own kinsman-redeemer (or perhaps his wife's brother) voluntarily provided him with the funds. His ability to earn the redemption money testified to his capacity as an independent man under God. *Capital was the sign of independence and maturity* and therefore the means of securing his family's freedom.

F. Jesus Christ as Kinsman-Redeemer

God always allowed His people in bondage to be redeemed. This, of course, testified to the coming redemption of the nation of Israel by Jesus Christ. One way for a man to be reunited with his servant wife was for him to become adopted as a household servant, with the "cir-

36. In the United States, fathers have historically paid for their daughters' weddings and post-wedding receptions. This is biblically foolish in a society in which the sons-in-law pay no bride price to the father. The prospective son-in-law should pay for everything. This is the father's evidence that the young man is thrifty, or at least a person who possesses inherited capital. Like the dowry that once came from the father as a gift, but which was based on the size of the bride price, so today are the presents that come from the wedding guests. The larger the wedding expenditure, the more guests who will attend; the more guests, the larger the number of presents. But the size of the wedding, and therefore the size of the gifts (her dowry) should be determined by the husband's ability to pay for the wedding, not her father's ability. The gifts to the couple are really the bride's, for they constitute her dowry, her economic protection in case she is unlawfully divorced. Should the daughter bring assets of her own to the marriage, they should remain her property in case of a divorce. They are not "community property"; they are her protection. At her death, these assets would normally go to her children.

cumcision of the ear" as the covenantal sign of household adoption. Only by adoption into God's family as a permanent bondservant can any person gain salvation (John 1:12). We become household servants in the family of faith.

Another important aspect of Christ's ministry is highlighted by the second avenue of escape from bondage, the bride-redemption system. Adam placed himself, his wife, and his heirs in spiritual bondage to sin. Eve suffered as a slave because of her husband's rebellious action. Ethically rebellious man still serves as a permanent slave to sin because he cannot pay the release price. But the *people of God* are referred to repeatedly in both testaments as being *God's bride*. "For thy Maker is thine husband" (Isa. 54:5a). Ezekiel 16 is built upon this analogy, as is Hosea 1–2. Christ referred to Himself as the Bridegroom (Matt. 9:15). Paul wrote: "I have espoused you to one husband, that I may present you as a chaste virgin to Christ" (II Cor. 11:2b). Ephesians 5, which describes Christ's relationship to His church, is built on the analogy of marriage. The final consummation of this marriage comes with the resurrection and final judgment, when Christians shall indeed be spotless.[37] But in principle, *we are betrothed now*.

The Bridegroom, as kinsman-redeemer, has paid our release price.[38] He progressively delivers the betrothed bride ethically, though at a distance, helping her to mature in the spiritual independence from sin that He has purchased. The church experiences *progressive liberation from sin and bondage* in history—a progressive liberation based on the Bridegroom's definitive redemption payment at Calvary. The Lord's Supper covenantally represents this communion with the Bridegroom. The church now awaits His return at the final consummation.

We know that we are in principle set free from sin, but in history, our sanctification is not yet complete. Christ has betrothed the church, thereby delivering us *legally* out of bondage to sin, but the consummation has not yet taken place. We wait for the return of our Bridegroom, who has redeemed us from the household of servitude. He did not betroth the church as a servant betroths. We will not re-

37. On the symbolic connections of circumcision to baptism, and the Passover to communion, and all four sacraments to the marriage supper, see my essay, "The Marriage Supper of the Lamb," *Christianity and Civilization*, 4 (1985).

38. The Bridegroom is Jesus Christ. He also holds the office of kinsman-redeemer, the one who has the legal responsibility of buying his nearest of kin out of slavery, if the slave is in bondage to a foreigner (Lev. 25:47–49). North, *Boundaries and Dominion*, ch. 31.

main in ethical bondage. He completed His work on Calvary. The resurrection testifies to His condition as a free man. We are resurrected in Him in principle—definitively set free *judicially and ethically* from sin as His lawful bride (Gal. 4:7).[39] But, in history, we still labor under the bondage of sin (Heb. 2:8–18). Our sanctification in history is not yet complete. We have not yet been presented as a chaste virgin before Christ (II Cor. 11:2). One reason why there is no marriage after the resurrection (Matt. 22:30) is that the church has but one husband, Christ. There will be no divided family loyalties.

The marriage covenant between Christ and His church did not take place before Calvary. He was still laboring to complete His term of service. He would not marry prematurely. It was the error of the Jewish multitudes that they expected liberation—both marriage and the consummation—in history, when they hailed Him as their earthly king and placed palm branches before Him as He entered Jerusalem in the final week of His pre-resurrection ministry (John 12:12–15).

G. The Fulfillment of the Jubilee Year

God's laws regarding Israel's land tenure system required that every fiftieth year, each plot of ground in Israel be returned to the heirs of the original family member who had it allocated to him after the conquest of Canaan (Lev. 25:8–34). This land tenure system was to keep those outside a particular tribe from becoming permanent owners of rural land throughout Israel. This restricted the intermarriage of the tribes (Num. 36),[40] and it also prohibited the consolidation of rural land by the Levites or the king. It was to keep the nation politically and economically decentralized. This system was also to keep strangers in the land—gentile alien residents—from ever becoming landowners rather than leaseholders, except through adoption into a Hebrew family.

1. Annulment

We know that this land tenure system was both judicially fulfilled and historically annulled by Jesus, for He explicitly transferred the kingdom of God to the gentiles (Matt. 21:43). The "strangers to the land" inherited God's kingdom. This judicial transfer of ownership of the kingdom to the gentiles is the legal foundation of the inheri-

39. North, *Unconditional Surrender*, ch. 2:D:1.
40. North, *Sanctions and Dominion*, ch. 22.

tance of the earth by Christians.[41] The kingdom of God no longer is uniquely connected to the land of Palestine. The conquest of Canaan by Joshua is no longer judicially relevant to members of the kingdom. The jubilee's land-release system is therefore no longer judicially relevant in history, except as a type of Christ's redemptive work in history.

The historical transition from the Old Testament to the New Testament, which was completed with the fall of Jerusalem in 70 A.D.,[42] also abolished another law that governed the period of servitude for heathen slaves: the residency requirements for full citizenship in God's kingdom commonwealth. The law that delayed citizenship for the heirs of bastards for ten generations (Deut. 23:2–3) was annulled with the historic destruction of Moab and Ammon, and also with the inauguration of a New Testament definition of lawful citizenship in God's kingdom: faith in Christ and covenant membership in the church.[43] As the kingdom of God in history becomes progressively manifested in the affairs of men, mankind's legal institutions are supposed to reflect God's kingdom. Men's institutions are supposed to be conformed to the principles of biblical law, just as men are supposed to be conformed to the image of God's Son, Jesus Christ (Rom. 8:29). To argue otherwise is to deny progressive sanctification in history, both for individuals and institutions.[44]

In New Testament times, any slave must be regarded legally as an indentured servant. Involuntary lifetime servitude was abolished when Jesus fulfilled the jubilee year; the only other form of servitude authorized by the Bible is indentured servitude. A slave in New Testament times is therefore entitled to be treated as a Hebrew servant was to have been treated in the Old Testament commonwealth, with his release delayed by no more than six years, except in cases of criminal sanctions. His children must be freed upon reaching their maturity at age 20.

2. A Long History of Self-Serving Bible Interpretation

Purchasing lifetime slaves from pagan nations or resident aliens was biblically legitimate prior to Christ's fulfillment of the jubilee

41. Gary North, *Inherit the Earth: Biblical Blueprints for Economics* (Ft. Worth, Texas: Dominion Press, 1987), ch. 5.

42. David Chilton, *The Days of Vengeance: An Exposition of the Book of Revelation* (Ft. Worth, Texas: Dominion Press, 1987).

43. This, of course, raises a whole host of problems for any theory of universal citizenship and therefore universal suffrage.

44. Gary North, *Dominion and Common Grace: The Biblical Basis of Progress* (Tyler, Texas: Institute for Christian Economics, 1987).

year, meaning prior to the abolition of its land tenure provisions. After Christ's death and resurrection, the Christian is to understand that slave-owning is for the purpose of liberating people from bondage, buying them out of demonic covenants. It is illegal to compel any male to remain in bondage beyond six years, except in the case of criminals paying off debts to victims.

This abolition of permanent slavery was long ignored or unrecognized by Bible commentators. It took Christians and Jews over 1,800 years to come to the conclusion that lifetime slavery is illegitimate. The myth that the "curse of the children of Ham" refers exclusively to blacks was adopted by Jews, Christians, and Muslims in the Middle Ages.[45] There had been a curse: Noah cursed Canaan, the son of Ham, but this curse was covenantal, not racial, and it was generally fulfilled by the conquest of the land of Canaan by the Israelites, and the subjection of the remnant as slaves.[46] Winthrop Jordan identified the source of the idea of Ham's curse as black skin: it first appeared in the Jewish Talmud and the Midrash.[47] Maimonides ("Rambam")[48] insisted that slaves should not be taught the Bible.[49]

The medieval church recognized that Christians were not to be enslaved by infidels (Jews, Muslims), although Christians could legally

45. David Brion Davis, *Slavery and Human Progress* (New York: Oxford University Press, 1984), p. 87. As late as 1867, Robert L. Dabney, the American South's greatest Calvinist theologian in the late nineteenth century, appealed to Genesis 9 and the curse of Canaan to justify the legitimacy of the idea of slavery in general: ". . . it gives us the origin of domestic slavery. And we find that it was appointed by God as the punishment of, and remedy for (nearly all God's providential chastisements are also remedial) the peculiar moral degradation of a part of the race." He did not argue that blacks are necessarily under this same curse, although he hardly denied it: "It may be that we should find little difficulty in tracing the lineage of the present Africans to Ham. But this inquiry is not essential to our argument." Dabney, *A Defence of Virginia [And Through Her, of the South]* (New York: Negro University Press, [1867] 1969), pp. 103, 104.

46. Davis appealed to the liberal higher critic Von Rad to argue that "the original Yahwistic narrative had nothing to do with Shem, Ham, and Japheth, and the ecumenical scheme of nations which follows. It was rather an older story, limited to the Palestinian Shem, Japheth, and Canaan. . . ." Davis, "Slavery and Sin: The Cultural Background," in Martin Duberman (ed.), *The Antislavery Vanguard: New Essays on the Abolitionists* (Princeton, New Jersey: Princeton University Press, 1965), p. 5n.

47. Winthrop D. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550–1812* (Chapel Hill: University of North Carolina Press, 1968), p. 18. He cited the Babylonian Talmud (Soncino Press edition), tractate *Sanhedrin*, vol. II, p. 745; *Midrash Rabbah* (Soncino Press edition), vol. I, p. 293. Reprinted by Bloch Pub. Co., New York.

48. Rabbi Moshe ben Maimon.

49. Maimonides wrote: "It is forbidden for a man to teach his slave the Scriptures. If he does teach him, however, the slave does not become free thereby." Maimonides, *Acquisition*, "Laws Concerning Slaves," V:VIII:18, p. 278.

own Christian slaves and non-Christian slaves.[50] The seventeenth-century Puritans, as dedicated to Old Testament law as any Christian group in history, did not believe that the sabbatical year of release, or any other law of mandatory release, applied to Negro slavery, whether the slaves were Christians or not.[51] The price of slaves was kept high because slave-owners could capitalize the income stream of a lifetime of service, plus the lifetimes of the heirs of the slaves.

The classic example of "Christian" slavery is probably the case of the bequest by Christopher Codrington to London's Society for the Propagation of the Gospel (SPG) in 1710 of a plantation on Barbados with over 300 slaves. Did the SPG release them? Hardly. In 1732, a Codrington attorney suggested that the SPG cease branding the chests of newly purchased slaves with "SOCIETY." On the subject of slave marriage, the SPG was silent. The Society did not even enforce a sabbath day of rest; the slaves were worked for six days, and allowed to tend to their own plots and work on Sundays.[52]

Nevertheless, we must recognize that *these slaves had been rescued from the culture of demonism*. Those who were converted to Christ are unquestionably better off today than they would be if they had remained slaves elsewhere, or even "free men," worshipping Satan under the fear of the local shaman. They did learn something of the Western, Protestant work ethic.

H. Lifetime Servitude

The only form of non-criminal lifetime servitude authorized today by the Bible is for men who voluntarily become permanent household servants and for women who voluntarily marry these lifetime servants. A servant wife must go free upon her husband's payment of her bride price, but she is not automatically set free with her husband.

Her potential lifetime of institutional servitude to her husband's former master is an institutional manifestation of a married woman's lifetime of covenantal subordination—a subordination that is necessarily involved judicially in every marriage covenant. This idea appalls most modern Christian commentators. They simply refuse to take this law seriously. They have also begun to refuse to take biblical

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50. David Brion Davis, *The Problem of Slavery in Western Culture* (Ithaca, New York: Cornell University Press, 1966), pp. 98–103.

51. *Ibid.*, pp. 203–7. Cf. Marcus W. Jernegan, "Slavery and Conversion in the American Colonies," *American Historical Review* (April 1916).

52. *Ibid.*, pp. 219–20.

marriage seriously. (When was the last time you heard any Christian scholar call for the imposition by civil government of the death penalty for adultery, as specified by Leviticus 20:10?)[53] Christians have begun to think as humanists do. Humanism's view of Exodus 21:2–4 is matched by twenty-first-century humanism's view of marriage.

God has imposed laws governing marriage, and therefore He has also imposed laws governing women who marry indentured servants. Humanists reject these laws. This is the reason why wives are regarded today as not being legally entitled to the economic protection that biblical law mandates for wives. Husbands are allowed to break their marriage vows almost at will. They are increasingly permitted by church courts and civil courts to abandon most of their economic obligations to their former wives. Modern humanism's hostility to the God-imposed legal requirements of Exodus 21:2–4 is generally accompanied by an equal hostility to the idea of marriage as a God-required legal subordination of wives to husbands: the biblical idea of marriage. Humanists take pride in defying God's law regarding servant wives, and then they take pride in ignoring God's laws regarding adultery. Innocent, non-adulterous wives are inevitably the victims.

Israel also defied God's laws regarding servitude. Prior to their captivity, Israel and Judah did not honor the terms of the sabbatical year, at least with respect to the resting of the land. Jeremiah says specifically that their removal from the land was required by God in order to give the land its accumulated sabbaths (Jer. 50:34; cf. II Chron. 36:21). Jeremiah's account also indicates that slaves had not been released, at least in his day (Jer. 34).

The institution of servitude is founded on the existing condition of all mankind as slaves to sin. Because of differences in ethical and moral capacities among men, some men find themselves unable to cope with their environment. Lacking an adequate degree of personal self-government, they need guidance in a disciplined but protected environment. The indentured servant system allows men to overcome their lack of self-discipline and lack of specialized knowledge of the requirements of dominion. For up to six years, a regenerate person can be kept in servitude in order to pay off his debts. A criminal, however, can be kept beyond the sixth year in order to make restitution. Indentured servitude protects the victims, either creditors or victims of crime.

53. As to the question of whether the death penalty was automatic, as distinguished from the maximum penalty that the victim (the woman's husband) could demand, see Chapter 34: "Kidnapping."

Wives of servants under the Mosaic Covenant were entitled to protection. The husband of a wife married in servitude had not exercised personal self-discipline (or was overcome by his environment) prior to his marriage, and had been forced to become a bondservant. Subsequently, he did not exercise long-term deferred gratification in order to wait for his release before marrying. Thus, his lack of self-discipline and lack of future-orientation was institutionalized by the marriage. His wife was the property of her master until the day that her husband could buy her freedom as her closest relative, meaning her kinsman-redeemer. A relative could always redeem a servant, even one owned by a foreigner (Lev. 25:48–49). She received the protection of one man or another who was capable of dealing successfully with his environment, either her liberated husband or her original master.

The man who paid the bride price to a girl's father in order to provide a concubine[54] for his son or his servant thereby became her covenantal father. In this sense, the office of father was legally transferrable. *This transfer was based on a legal adoption*. Adoption is also the legal basis of marriage; the bride is adopted into the family of her husband.[55] Thus, the released male bondservant owed the slave-owner a bride price for the wife he had already been given, for the slave-owner had taken the office of covenantal father from her biological father. This is the reason why Jacob owed Laban seven additional years of service for Rachel: she had come to him in advance of any such payment. Until the bride price was paid to her owner, the servant wife would remain the master's *legally adopted daughter*. She would have to remain in his household. The payment of the bride price to her biological father by her master was the legal basis of her continuing position as bondservant in her master's house, but the payment of the release price by her released husband to her legal owner would be the legal basis of her emancipation. There was always the legal possibility of release from female indentured servitude by means of a payment of a release price or a bride price.

Conclusion

The goal of indentured servitude is to impart the economic and self-motivational skills of dominion to people who have in the past

54. A wife whose father had not provided her with a dowry.

55. Ray R. Sutton, *Second Chance: Biblical Blueprints for Divorce and Remarriage* (Ft. Worth, Texas: Dominion Press, 1987), Part 2.

not demonstrated their ability to cope with a cursed, resistant environment. The goal is *ethical* self-government, but the starting point is *economic* self-government, which is the responsibility of all free men under God. A person who has been broken by some aspect of the external environment is given the tools of dominion—ethical, educational, motivational, and, after at most six years of service, technological—by his close contact with, and subordination to, a competent master.

There was one major danger in this system. The master might decide to gain a lifetime pair of bondservants for himself by taking advantage of the present-orientation of the male bondservant. If he could persuade the man to accept a servant girl as his wife, he might be able to persuade the man later on to become a lifetime bondservant by submitting to the ritual of the drilled ear (Ex. 21:5–6). There are always pitfalls for present-oriented men. But in ancient Israel, a man who wanted a wife or a concubine would have had to pay a bride price anyway. The difference was, a released man might be able to earn this by saving his money for several years after his release. By taking a bride before his release, he might find this too difficult, and so he might have been tempted to sell himself into lifetime servitude. But this was the outgrowth of the moral flaw of the bondservant: his present-orientation.

32

WIVES AND CONCUBINES

> *And if a man sell his daughter to be a maidservant, she shall not go out as the menservants do. If she please not her master, who hath betrothed her to himself, then shall he let her be redeemed: to sell her unto a strange nation he shall have no power, seeing he hath dealt deceitfully with her. And if he have betrothed her unto his son, he shall deal with her after the manner of daughters. If he take him another wife; her food, her raiment, and her duty of marriage, shall he not diminish. And if he do not these three unto her, then shall she go out free without money.*
>
> EXODUS 21:7–11

The theocentric issue here is God as the bridegroom of Israel. God first adopted Israel, then married her (Ezek. 16:1–14). He showed grace to an abandoned daughter of Canaan (vv. 3–4). This symbolism was not to serve as a license for incest, which was (and still is) explicitly prohibited by biblical law (Lev. 18:6–7).[1] This symbolism was a defense of the biblical office of husband: he adopts a bride.

The Mosaic servitude laws that governed female bondservants were tied directly to the laws governing marriage. The reason was simple, though not inherently obvious: *a Hebrew woman could not be permanently purchased, although she could become a maidservant; she could only be adopted*. She could not go out of her father's household "as the menservants do." The theocentric principle illustrated by this law is this: *adoption by God is the sole basis of man's deliverance*.

These laws governed female bondservants, and they also governed marriage. The marriage of a female bondservant was governed by laws different from those governing the marriage of a free woman.

1. This poses a difficult exegetical problem for those who deny the continuing authority of Old Testament law in the New Testament era: On what basis can one biblically and authoritatively deny the legality of incest?

Why should this have been the case? How was marriage to a bondwoman different from marriage to a free woman? Why would God have established two different forms of marriage? Does such a distinction still apply to marriages in New Testament times?

We must begin our analysis with the biblical doctrine of the bride of God, a theme that appears throughout both Testaments. We must begin with the covenantal marriage between God and Israel, for we recognize the theocentric nature of the Bible. God's covenantal relations with men should always be our starting point for any discussion of men's relationships with each other and with the environment. Therefore, before we examine the economics of this slave wife transaction, we must first understand the distinction between a wife and a concubine. *A wife came into an Old Covenant marriage with a dowry; the concubine did not*.

A. God Married Israel

God speaks of Israel as His bride in Ezekiel 16. The chapter begins with a description of Israel's illegitimacy. God told Ezekiel, "And say, Thus saith the Lord GOD unto Jerusalem; Thy birth and thy nativity is of the land of Canaan; thy father was an Amorite, and thy mother an Hittite" (Ezek. 16:3). The parents had ignored the child, not even cutting its navel or washing it (v. 4). The infant had been cast off by its parents, even as a bastard child is cast off, "to the loathing of thy person" (v. 5). Israel was therefore an orphan as well as a bastard.

God "passed by" Israel, and "saw thee polluted in thine own blood" (v. 6). He caused Israel to multiply, to come to maturity. God again "passed by" Israel, and looked with mercy on the nation. Then God married Israel: "Now when I passed by thee, and looked upon thee, behold, thy time was the time of love; and I spread my skirt over thee, and covered thy nakedness: yea, I sware unto thee, and entered into a covenant with thee, saith the Lord GOD, and thou becamest mine" (v. 8). The imagery is very similar to the imagery in Ruth 3, where rich Boaz spread his own cloak over poverty-stricken Moabitess Ruth (v. 10), as a testimony of his covenantal promise to marry her (v. 13).

1. Concubine or Bride?

The question is: Was Israel a concubine or a true bride? Ezekiel 16 assures us that Israel was a true bride. Ezekiel describes God's provision for His bride:

> Then washed I thee with water; yea, I throughly washed away thy blood from thee, and I anointed thee with oil. I clothed thee also with broidered work, and shod thee with badgers' skin, and I girded thee about with fine linen, and I covered thee with silk. I decked thee also with ornaments, and I put bracelets upon thy hands, and a chain on thy neck (vv. 9–11).

The description continues: God gave Israel a jewel for her forehead, earrings, a crown, fine linen, and the best food (vv. 11–13). "And thy renown went forth among the heathen for thy beauty: for it was perfect through my comeliness, which I had put upon thee, saith the Lord GOD" (v. 14). But then Israel played the whore, trusting in her own beauty (vv. 15–31). "But as a wife that committeth adultery, which taketh strangers instead of her husband! They give gifts to all whores: but thou givest thy gifts to all thy lovers, and hirest them, that they may come unto thee on every side for thy whoredom" (vv. 32–33).

Israel was God's bride, not His concubine. What was the difference between a bride and a concubine? It was the presence of a dowry in the original marriage covenant. The concubine possessed no dowry. Israel had possessed nothing of her own to bring into the marriage. God had discovered Israel as a man discovers a cast-off infant at the side of the road. Upon her maturity, God graciously washed her and "covered her nakedness" with his own garment (v. 8a), a symbolic reference to marriage: "yea, I sware unto thee, and entered into a covenant with thee" (v. 8b). There is no question: Israel was God's bride. Her adultery was therefore much worse than if she had been a mere concubine. She had been decked in ornaments, the proof of her status as a wife, yet she had traded them for the pleasures provided by male whores, meaning the gods and rituals of the surrounding nations. Worse than a whore who was in it for the money, Israel was a wife who was in it for the sheer pleasure of covenant-breaking. It was the difference between the low-passion, income-seeking sin of the professional prostitute and the high-passion, self-conscious rebellion of the adulterer. Prostitution was not a capital crime in Israel; had it been a capital crime, there would have been no need for a law prohibiting the high priest from marrying a prostitute (Lev. 21:14). Adultery was a capital crime (Lev. 20:10). This was the heart of Israel's self-conscious perversion: "And the contrary is in thee from other women in thy whoredoms, whereas none followeth thee to commit whoredoms: and in that thou givest a reward, and no reward is given unto thee, therefore thou art contrary" (v. 34). It was Israel's position as a bride with her own assets, enabling her to pay for her consorts, that marked her as uniquely evil.

2. Grace and Marriage

God's marriage to Israel was an act of grace. God recognized that Israel was a bastard nation, an orphan. Ultimately, this is the spiritual and legal condition of all humanity, for humanity is fallen, disinherited by God because of Adam's rebellion. Nevertheless, God singled out Israel as uniquely fallen, uniquely in need of God's grace. Without God's grace, there could be no life, marriage, or future.[2] Thus, God displays His common grace to all people by giving them life, marriage, and a future. But He displays His special grace to His people by entering into a covenant with them, one so intimate that only the marriage analogy suffices to explain it (Eph. 5:22–23).

If God had not stopped to give life to Israel, the people would have perished. Moses' generation was to learn this lesson again and again in four decades of wandering. If God had not married Israel, the Hebrews would have had neither protection nor hope for the future. God granted them both life and protection. He granted them legitimate hope.

For Israel to become a fully protected bride, she had to receive a dowry. The dowry served the bride as her token of security in case her husband divorced her or in other ways abused her. The dowry was her token of independence. A free woman was a wife who could survive economically even if her husband broke his covenant with her. God provided a huge dowry to Israel in Ezekiel 16 as a visible manifestation of His grace and protection. What husband would endow a wife with such wealth if He intended to divorce her? Thus, the very magnitude of His visible grace testified to her permanently protected legal status under God.

Israel then squandered her dowry in repeated acts of covenantal rebellion. She impoverished herself through idolatry and whoredom. Step by step, she placed herself in the economic position of a concubine: an unendowed wife. But she was far worse than a concubine, who would have possessed no dowry of her own to squander; she was an adulteress who had squandered God's marriage gifts. She was clearly deserving of death (Lev. 20:10). It was only God's grace to Israel in not bringing her before the bar of justice that enabled her to maintain her status as even God's concubine.[3]

2. Gary North, *Dominion and Common Grace* (Tyler, Texas: Dominion Press, 1987).

3. At the end, national Israel pronounced judgment against Jesus Christ and joined with her false lover, Rome, in a fatal affair. Both perished, but national Israel perished first, when she twice proved false to Rome in rebellion, in A.D. 69–70, and in A.D.

What this testifies to is that *even the concubine's status is a position that depends on grace*. God recognizes that societies and individuals fall into sin, and from sin into poverty (Deut. 28:18). Thus, His law made it possible for a daughter of a poor Israelite to marry into a family that could afford to pay a bride price. In effect, *this option of concubinage was a poor girl's way out of poverty*. Her father had no way to protect her economically. If every marriage had required a dowry, she might never have been able to marry. Her future as a mother would have been cut off. So, God graciously established a way out: concubinage. This pointed to something that the Bible never says explicitly, but which Ezekiel 16 points to: the biblical requirement of the bride price for a free woman.

B. Bride Price and Dowry

God gave Israel jewels and bracelets. This is reminiscent of the gifts to Rebekah from Abraham's servant: "And the servant brought forth jewels of silver, and jewels of gold, and raiment, and gave them to Rebekah: he gave also to her brother and to her mother precious things" (Gen. 24:53). Abraham, as Isaac's father, used his capital to pay the girl and her relatives. The property would ultimately have become Isaac's, however, for it was part of his inheritance. Abraham acted as a *representative* of his son. He supplied the bride price, and his own agent acted in Isaac's best interests. The gifts from Abraham served as her dowry, and the gifts to the relatives served as a bride price. This indicates that the bride price could be separated from the dowry, meaning that *the family could keep part of the total payment without passing the total bride price to the daughter as her dowry*. This could become a means of increasing the capital base of the family of the bride. This would clearly have made the daughter an economic asset for her family.

There was a covenantal reason for this economic obligation on the part of a bridegroom. The father of the prospective bride represented God to his daughter. This covenantal authority before God—this position as *God's representative* to his daughter—had to be lawfully transferred from the father to the bridegroom. By paying the bride price to her father, *the bridegroom ritually swore to a lifetime of faithfulness to his wife as God's representative over her*, faithfulness comparable

132–34 under Bar Kochba. The Jews were scattered throughout the empire by the Romans in 135. See Heinrich Graetz, *History of the Jews*, 6 vols. (Philadelphia: Jewish Publication Society of America, [1893] 1945), II, chaps. 15, 16.

to what her father's faithfulness to her had been. This is precisely what Jesus swore to God the Father in His role as the cosmic Bridegroom. He paid the price at Calvary. God then transferred all authority over heaven and earth to Christ as His lawful representative (Matt. 28:18–20).[4]

1. Cancelling the Daughter's Obligation

The dowry functioned in Israel as an alternative to inheritance by daughters. Sons inherited the family land in the Old Testament, not daughters. Sons had the responsibility of caring for aged parents, not daughters and sons-in-law.[5] To whom much is given, much is expected (Luke 12:47–48). Because the daughter could not inherit, she was not obligated to share in her parents' support. But because she would not share in her parents' support, she was not supposed to receive her dowry from her father's capital, for this would deplete the portion remaining to her brothers. The system was consistent.

Normally, the bride price was used to repay the family for the expense of the dowry. Such a system guaranteed that being a daughter would not be regarded by her family as being an economic liability. The bride price kept daughters from draining the inheritance that normally went to sons. A daughter did not normally remain economically responsible for her parents; she became responsible for her husband's parents. Why? Because legally she was *adopted* into the family of her husband. Thus, inheritances in Israel went to sons, who later cared for aged parents, and dowries went to daughters, who extended their original family's ethical standards over time, though not the family's name.

To enable a girl to leave her father's household as a free woman—a wife with a dowry—the bridegroom paid the bride price. Most of the bride price or perhaps all of it would have passed to his wife as her dowry. By paying her father the equivalent of the girl's dowry, *he was relieving both her and himself from the legal obligation to support her parents in their old age*. The girl's father would officially provide the dowry. The daughter would therefore be in a position to take a portion of the family's inheritance now, indicating her future obligation. Then the bridegroom would replace the dowry with the payment of the bride price, thereby relieving her and himself of the future responsibilities

4. Kenneth L. Gentry, *The Greatness of the Great Commission* (Tyler, Texas: Institute for Christian Economics, 1990).

5. R. J. Rushdoony, *The Institutes of Biblical Law* (Nutley, New Jersey: Craig Press, 1973), p. 180.

associated with supporting her parents. Her brothers lost nothing, she gained a dowry, and he escaped the future obligation of supporting her parents.

Whether she brought a dowry into the marriage or not, the bridegroom had to pay the bride price to her father or to her brothers. This indicated that, *in principle*, he owed the family of the bride some form of service if he was going to be permitted to marry the daughter. He was allowed to substitute a bride price for actual service. In Jacob's case, for example, he actually had to serve Laban for 14 years in payment for Rachel and Leah, for he had no capital to pay the bride price, because he had fled from his father's house without bringing his inheritance (Gen. 29). Why did Jacob owe such service? Because in each marriage, he wanted a wife with a dowry, but if their father had unilaterally paid the dowry each time as their brothers' representative, then in effect the brothers were paying the sisters to leave the family and join themselves to another family. This would have been the economic equivalent of the daughters' taking present family assets, yet also avoiding future family responsibilities.

Without the existence of the bride price requirement, a girl's brothers would have been tempted to regard her as a liability, a potential drain on the family's capital, meaning their own inheritance.[6] They would have had an incentive to refuse to allow any man to marry her, for her services in the existing household would have been valuable. Why give her up to serve another, and also allow her to take with her present family capital? Who could be sure that she and her husband would support the aged parents in the future? How could her brothers enforce such a requirement? In contrast, with a bride price system operating, there was even a possibility for family gain as well as loss, as the case of Rebekah's family indicates. Old Testament law nowhere specified that all of the bride price would become the girl's dowry. The bride price might sometimes actually exceed the dowry.

2. Competitive Bargaining

The final allocation of the bride price would have been established by competitive bargaining of her father and the potential bridegroom

6. In India, a Hindu with many daughters is ruined. If he also has sons, they will inherit little. The cost of the dowries will wipe out his capital. This makes daughters a liability. A similar rule prevailed in early modern Europe, where fathers had to supply the dowry to the grooms. "Girls became, in such a system, a liability." Rushdoony, *Institutes*, p. 177. He cited Iris Origo, *The World of San Bernardino* (New York: Harcourt, Brace & World, 1962), pp. 52–53.

or by their representatives.[7] Shechem's father Hamor dealt with Jacob and Dinah's brothers in the matter of his son's seduction of Dinah, although the text indicates that Shechem was also present (Gen. 34:6–11). In general, bargaining being what it is, the two payments would have been similar in magnitude, except in the case of a seduction. In this unique case, the bride price was far more likely to exceed the normal dowry. Because Shechem was a seducer, he was in no position to bargain: "Ask me never so much dowry and gift, and I will give according as ye shall say unto me: but give me the damsel to wife" (Gen. 34:12).

Why couldn't the father have agreed with the bridegroom on allowing a marriage with neither dowry nor bride price? The girl would not deplete her brothers' inheritance by taking a dowry with her, and the bridegroom would not be required to come up with the bride price. After all, if the size of the bride price was even close to the dowry, the marriage could presumably take place without either of the ritual asset transfers: bridegroom to father, father to daughter. What would have been wrong with this? There are three reasons: (1) the bride price served as a screening device; (2) it served as a ritual sign of subordination; and (3) the dowry served as the woman's protection against the short-sightedness of her husband and perhaps also her father and brothers.

3. Screening Device

By the payment of the bride price, the groom was also acknowledging that he was capable of being as good a supporter of the girl as her father had been. He needed to assure her family of her future economic protection, thereby releasing her father and brothers from this legal responsibility. His ability to follow through on this covenantal guarantee was revealed by his ability to pay the bride price. The bride price was therefore an economic screening device for the family of the girl. The bridegroom's ability to pay a bride price was

7. This same competitive outlook regarding arranged marriages prevailed in seventeenth-century New England; so did the system of family representation. Edmund Morgan described the process of marriage bargaining: "...in many cases the wooing of a lady consisted largely in financial bargaining. In the case of widows and widowers the haggling took place directly between the parties concerned, but in most first marriages the parents fought out the sordid pecuniary details while the children were left to the business of knitting their affections to each other. The latter process, however, was usually supposed to follow rather than precede the financial agreement." Edmund S. Morgan, *The Puritan Family: Religion and Domestic Relations in Seventeenth-Century New England*, rev. ed. (New York: Harper Torchbooks, [1944] 1966), pp. 56–57.

evidence of his outward faithfulness to the terms of God's covenant.[8] The parents were transferring legal responsibility to a new covenantal head. They were participating in the establishment of a new family. Thus, the in-laws had to serve as God's agents. Rushdoony wrote that "the Hebrew word for bridegroom means 'the circumcised,' the Hebrew word for father-in-law means *he who performed the operation of circumcision*, and the Hebrew word for mother-in-law is similar. This obviously had no reference to the actual physical rite, because Hebrew males were circumcised on the eighth day. What it meant was that the father-in-law ensured the fact of *spiritual circumcision*, as did the mother-in-law, by making sure of the covenantal status of the groom. It was their duty to prevent a mixed marriage. A man could marry their daughter, and become a bridegroom, only when clearly a man under God."[9]

The bride price was also a sign of the bridegroom's future-orientation and self-discipline. Because Jacob came without capital into Laban's household, he first had to work for Laban as a servant for seven years in order to prove his capacity to lead his own household. To lead covenantally, you must first follow. To rule, you must also have served. Dominion is by covenant, and covenants are always hierarchical.[10] This hierarchical structure of the biblical covenant is, above all, the message of the Book of Exodus. Israel was to be visibly under God's administration, not Pharaoh's.

Finally, the bride price was proof of the bridegroom's lawful subordination to his own father, under whom he had probably worked in an agricultural society, or from whom he had received the bride price as part of his inheritance.[11]

4. Symbol of Subordination

The bride price was an extension of the bridegroom's productivity to the girl's household. The bride price was therefore symbolic of the

8. Those who deny that there has ever been any relationship between individual productivity and personal faithfulness to the external requirements of the covenant (Deut. 28:1–14) will reject this explanation of the usefulness of the bride price. Those who think it makes sense as a screening device will be led to conclude that there must have been a predictable relationship between economic performance and faithfulness to the covenant's external requirements.

9. Rushdoony, *Institutes*, p. 344.

10. Ray R. Sutton, *That You May Prosper: Dominion By Covenant*, 2nd ed. (Tyler, Texas: Institute for Christian Economics, [1987] 1992), ch. 2.

11. Christ's faithful service to His Father during His earthly ministry was the basis of His ability to provide a bride price for the church.

son-in-law's devotion and subordination to her father, *as if he were a family member*, although this was not an actual contract to become a son who would inherit. The bride price testified to the covenantal requirements that sons-in-law owe to fathers-in-law. It testified that the bridegroom had previously served someone else (probably his father) productively, and he had amassed capital equivalent to what could be accumulated during a period of subordination to the father-in-law. He then transferred this capital to his father-in-law as a *ritual sign of his subordination*.

The bride price compensated the father for the expense of the daughter's dowry. From a purely economic standpoint, the dowry could have been delivered directly from the bridegroom to the daughter. Why did God require this seemingly unnecessary intermediate step, the payment of the bride price to the father? *Because the formal transfer of the bride price to her father pointed to the bridegroom's requirement of covenantal subordination to her father*. We see this clearly in the case of Saul's insistence on payment from David, despite the fact that Saul did not ask David to supply Michal's dowry. Saul could require the payment of a bride price. In fact, the killing of Goliath was in effect the bride price. He promised his daughter to the one who defeated Goliath (I Sam. 17:25b). Saul was demanding the payment of an additional bride price, the hundred foreskins of Philistines. Neither the death of Goliath nor the foreskins of the Philistines would have served as an economic dowry for his daughter.

David knew that he could not afford the bride price appropriate to a king's daughter, for he was a poor man (I Sam. 18:23b). Only if Saul fulfilled his promise and supplied David with great riches (I Sam. 17:25b) could David afford the bride price. The king, by implicitly agreeing to supply her with her dowry, was in effect backing away from his original promise to give Goliath's victor great riches. What he insisted on instead was the payment of a second bride price that he believed was in his own interest, though not his economic interest. "Thus shall ye say to David, The king desireth not any dowry, but an hundred foreskins of the Philistines" (I Sam. 18:25a). He hoped to see David killed in an attempt to pay it (I Sam. 18:25b). David delivered the hundred foreskins to Saul in place of the normal bride price, much to Saul's surprise and consternation (I Sam. 18:29). *The issue was not economics; it was covenantal subordination*. David was obedient to Saul continually.

The passage in Ezekiel 16 does not mention the payment of a bride

price by God to Israel's parents. This is because Israel was a bastard. The parents—Amorites and Hittites—had cast out the nation of Israel. Israel was covenantally not only a bastard but also an orphan. So, God intervened and paid Israel's dowry directly to the bride by dressing her. He owed nothing to the Amorites or Hittites. He was in no way obligated to any pagan culture.

5. Protection for the Wife

The dowry was an extension of the father's reputation and his family's reputation to his daughter and her children. It was a sign of future-orientation on his part. The dowry testified to the father's covenantal obligation to future generations born through his daughters, even though they would not inherit his name or his land. It also acknowledged that daughters were not covenantally inferior to sons.

The dowry assured the daughter a degree of economic independence if her future husband proved incompetent or died without leaving her much immediately useful capital, or if he divorced her.

The dowry served as a kind of "incompetence insurance." What if her husband divorced her, and her father and brothers should lose their wealth at the same time? The wife could not easily return empty-handed to her father's household under such conditions. With a dowry she would be protected from this sort of dual calamity.

6. The Concubine

God in his grace protects women. Brides need protection. The Old Testament required payment to the bride's family. This insured at least some degree of competence on the part of bridegrooms or their families. But God also acknowledges the legitimacy of marriage despite a girl's poverty. She was not absolutely required to bring a dowry into the marriage, the way the bridegroom was required to bring a bride price. Her father's improvidence was not to make her marriage impossible; his improvidence was not supposed to trap her in his household if there was a way for her to improve her economic position.

The evidence of a slave marriage's forced status was the fact that her father kept the bride price. By keeping it, he was acknowledging that he had been improvident, and that he either cared little for his daughter's future protection against an unjust husband, or that he simply could not afford to give her the dowry she needed. In either case, his failure to provide her a dowry lowered her future legal status

to that of concubine (slave wife). On the other hand, there were economic benefits to compensate her for her lowered legal status.

If a girl's father was so defenseless economically that he decided to sell her, she obviously had very little, if any, choice in the matter. Nevertheless, it was better for her to be provided for in a new household than to live hand to mouth in her father's household. But to improve her economic position by moving out of her impoverished family's household, she had to sacrifice her legal status as a free woman. This would be a marriage of necessity, a slave marriage. This was the legal meaning of concubinage. She was going to be put into the position of a slave. She could not veto this slave marriage (concubinage), any more than a male Hebrew slave could veto a decision by his master to sell him to a new master.[12]

This is indirect evidence that daughters in Israel did have the right to veto *conventional* arranged marriages. That was part of what it meant to be a free woman: neither completely dependent on an improvident father nor on an improvident or unjust future bridegroom. The dowry system provided this protection, thereby making her a free woman. *Wealth revealed her legal status*.

C. Marriage and Adoption

The text reads: "And if a man sell his daughter to be a maidservant, she shall not go out as the menservants do. If she please not her master, who hath betrothed her to himself, then shall he let her be redeemed: to sell her unto a strange nation he shall have no power, seeing he hath dealt deceitfully with her" (Ex. 21:7–8). What does it mean, "she shall not go out as the menservants do"? This refers to the girl's special position of covenantal subordination. She could not be bought and sold by resident aliens in the same way that sons could be.[13]

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12. Maimonides supported half of my contention. On the one hand, he denied that a Hebrew male servant could be sold to any other family. Moses Maimonides, *The Book of Acquisition*, vol. 12 of *The Code of Maimonides*, 14 vols. (New Haven, Connecticut: Yale University Press, [1180] 1951), "Treatise V: Laws Concerning Slaves," IV:10, p. 262. On the other hand, he did affirm that the young bondwoman could reject the proposed marriage: *ibid*., V:IV:8, p. 262.

13. Maimonides concluded that the phrase, "she shall not go out as the menservants do," meant that if her master knocked out her tooth or blinded her in one eye, she would not become a free woman, although a male bondservant injured this way did go out free. This, in spite of the plain reading of the text: "And if a man smite the eye of his servant, *or the eye of his maid*, that it perish; he shall let him go free for his eye's sake" (Ex. 21:26). *Ibid*., V:IV:6, p. 261.

1. Protection for Daughters

The text says that "to sell her unto a strange nation he shall have no power, seeing he hath dealt deceitfully with her." Does this mean that female servants who had not been deceived could be sold into a foreign nation, meaning outside the land? It could not possibly mean this, because no Hebrew could be sold lawfully to anyone outside the land. The Hebrews were sojourners with God *in the land* (Lev. 25:23). The term "strange nation" must be interpreted here as "strange people." These were resident aliens in Israel. A Hebrew male servant could be sold to any Hebrew inside the land.[14] Normally, the resident alien was not under the limitations of the sabbatical year; he was only under the terms of the jubilee year. Because the resident alien could capitalize up to 49 years of service from a Hebrew male bondservant (Lev. 25:47–52), he was in a position to offer a higher purchase price. This would have created a major source of profit: buying sabbatical-year-release Hebrews bondservants and selling them to pagans. Therefore, we have to conclude that if a Hebrew sabbatical-year bondservant was sold to a resident alien, the stranger would have had to abide in this unique instance by the terms of the sabbatical year. *It is illegal to sell what you do not own*; a Hebrew who purchased a sabbitical-year Hebrew servant did not own any claim on his services beyond the sabbatical year.[15]

What this passage establishes, at the very least, is that a Hebrew girl could not be sold to a stranger.[16] There was a covenantal reason for this restriction: *hierarchy*. A woman was always covenantally subordinate to a man, except for a widow (Num. 30:9). She was inherently in a position of covenantal subordination. It was therefore illegal to sell her into a pagan household ruled under pagan household deities. This cultural influence was too dangerous for her, compared to the risks for a man. A father could not sell a daughter into a foreign household, for he was her lawful representative before God. His son could lawfully be sold into servitude to a resident alien.[17]

14. Maimonides denied this: "The Hebrew slave may neither be sold by her master or given away to another man, regardless of whether he is a stranger or a kinsman." Maimonides, *Acquisition*, V:IV:10, p. 262. He went so far as to say, "Neither may one sell or give away to another a Hebrew male slave." *Idem*.

15. A Hebrew convicted of a crime and sold into bondservice was therefore legal to sell again to a resident alien on the same terms: service for full restitution.

16. Rabbi Moses ben Nachman [Ramban], *Commentary on the Torah: Exodus* (New York: Shilo, [1250s?] 1973), pp. 352–53.

17. The relevant case law in this regard is Exodus 21:7: "And if a man sell his daughter to be a maidservant, she shall not go out as the menservants do." This implies that sons could be sold.

2. Adoption

The daughter referred to in the text was someone who had been bought from her father to become a wife, either for the master or for his son. Thus, she was bought by means of *a permanent transfer of authority*. The master, as either a future husband or future father-in-law, was making a permanent purchase. If he bought her to give to his son, then *he was covenantally becoming her father*. He would thereby take full responsibility *as her covenant father* for giving her to his own son, who would guarantee her a lifetime of support. He was in effect *adopting* her into his household. It was not a six-year or less guarantee, but rather a lifetime guarantee.[18]

Consider Ezekiel 16. At first, Israel is described as a discarded infant. God "passes by" her, picks her up, and raises her until she becomes an adult (vv. 6–7). This was clearly an act of adoption. Then the same phrase occurs again, God "passes by" her (v. 8). This time, however, God married her. Thus, with respect to God's salvation of Israel, *covenantal adoption took place before covenantal marriage*. This is why Exodus 21:8 says, "If she please not her master, who hath betrothed her to himself, then shall he let her be redeemed." The master was not allowed to keep her if he did not marry her, assuming some relative would buy her. He was able to buy her only as a bridegroom purchases a wife for himself, or as a father purchases a wife for his son.

The text says, "And if he hath betrothed her unto his son, he shall deal with her after the manner of daughters" (v. 9). He was required to treat her as if he were her father, for covenantally speaking, *he had in fact become her father*. When Abraham sent his servant to find a wife for Isaac, he was in effect adopting Rebekah into his household. He was taking parental responsibility for her. He was promising to watch over her as conscientiously as her own father or brothers would.

Similarly, when a bridegroom took a wife, he was becoming her covenantal brother.[19] This is why Abraham was not lying to Abimel-

18. Maimonides viewed her tenure as an espoused bride as ending when she reached puberty, after age 12. Fathers could not sell daughters, he argued, once they reached puberty: *Acquisition*, "Slave Laws," IV:1, p. 259. She had to consent to the marriage, IV:8, p. 262. If the master refuses to marry her, either to himself or his son, "she shall go out free for nothing" at puberty: IV:9, p. 262. He was silent about the explicit biblical text, "let her be redeemed" (v. 8). If the master fails to marry her, her father or kinsman-redeemer can redeem her. The text says nothing about going out for free, or her puberty, or any restriction against the sale of daughters beyond puberty.

19. Sutton, *That You May Prosper*, pp. 149–51.

ech when he called Sarah his sister (Gen. 26:7). This is why the betrothed man in the Song of Solomon exclaimed, "Thou hast ravished my heart, my sister, my spouse.... How fair is thy love, my sister, my spouse!" (Song 4:9a, 10a). The bridegroom promised to care for the woman as if he were her brother. Covenantally, she was adopted into the family of her husband. The Western practice of giving the bride the last name of her husband indicates her adoption into the bridegroom's family. This is also why both sets of parental in-laws are usually referred to as Mom or Dad by the children. It is a verbal acknowledgment of the covenantal relationship of adoption.

D. The Concubine

Rachel and Leah complained that their father Laban had squandered the inheritance that they and their children were entitled to (Gen. 31:14–16), treating them as if they had been sold into slavery. They had in mind the accumulated earnings of 14 years of Jacob's labors to pay their bride prices. Jacob had earned this wealth back from Laban, as they recognized (v. 16), but this meant that it once again belonged to Jacob; they still had no dowries. They were being relegated by their father to the status of concubines, not wives.

1. Endowing a Daughter

In ancient Israel, keeping the bride price was the economic equivalent of selling a daughter into slavery. When a father in this way sold his daughter to a husband, he was legally making her a concubine. He did not pass on to her any portion of the money he had received from the bridegroom or her future father-in-law. He kept it all. This is why the transaction was a purchase. His daughter was becoming a bondservant inside another man's household. This bondservice would not be governed by the sabbatical principle of the year of release. Also, her father did not retain the right of redeeming her as her kinsman-redeemer, unless the man who bought her decided before the marriage to return her, and her father could and would repay him his bride price. Thus, a concubine was a permanent bondservant who worked at the discretion of her husband.

Does this mean that her betrothed husband could have sold her to another Hebrew at will? To answer this question, we must first look at the covenantal nature of her position. The text speaks of "her master, who hath betrothed her." The betrothal constituted a marriage promise, but because she was not a free woman, meaning a woman with a

dowry, this was not a totally binding vow on his part. It was not the same legally as a promise to marry a free woman for whom a bride price had been paid, and who brought a dowry into the marriage. We know that it was not the same, because it was not considered adultery for another man to have sexual relations with her. The two would be scourged but not executed, "because she was not free" (Lev. 19:20). If a woman possessed a dowry, then a betrothal was the same covenantally as a marriage vow. Sexual relations with such a woman was a capital crime (Deut. 22:23–24). Thus, there were two kinds of betrothals; they were covenantally and legally different. The covenantal sign that distinguished between them was the dowry. The difference was covenantal—free vs. unfree—but the visible manifestation of this difference was economic.

The question then arises: Which was the determining factor in determining her status, the legal or the economic? *The Bible always places the foundational status of all human relationships in the legal sphere, not the physical, intellectual, emotional, or economic sphere*. It is this legal relationship that governs all of God's relationships with mankind, either saved or lost. What was the covenantal basis of her legal status as a wife? Her position as an *adopted daughter*. Her father allowed her to be adopted by another family. He relinquished his position as her covenantal representative before God.

What about her status as a concubine? Her father determined the economic terms of her adoption. He chose to keep the bride price for himself. In so doing, he placed her in a second-best legal status. His motivation was no doubt deeply tied to his personal or familistic economic goals, but the basis of her status as a concubine was the result of a *legal transfer of covenantal authority over her*, not economics as such. Her primary status was that of wife, meaning an adopted sister (Song 4:9–10). Her secondary legal status as a concubine stemmed from the nature of the one-step transfer of wealth from the bridegroom to her father. Biblical law recognized her vulnerability and took steps to protect her. Her father determined her legal status; economics was his motivating factor in making this legal determination.

2. Consummation and Legal Protection

Once their sexual union had taken place, the marriage was covenantally complete. It then became a capital crime for another man to take her sexually. Thus, she became a true wife. We now return to the original question: Could her husband then sell her to anyone who

would pay him what he had paid to her father? The text does not indicate any such right on his part. He could sell her to another Hebrew during the betrothal period with her family's consent. He could thereby transfer her covenantal position as an *adopted woman*, though not to a resident alien, who did not have the legal right of adopting Hebrews into his household. But once covenantally bonded sexually before God, she became his wife. He could not divorce her, except insofar as any wife could be divorced. The Bible is silent about any special divorce proceedings available to him under concubinage.

On the other hand, the concubine could divorce him under certain specified circumstances. She had the three rights of any wife: food, clothing, and sexual relations. This meant that she had the right to be given an opportunity to bear children. The text says, "If he take him another wife; her food, her raiment, and her duty of marriage, shall he not diminish. And if he do not these three unto her, then shall she go out free without money" (vv. 10–11). Why list food and clothing here? Any bondservant had the right to food and clothing. Masters could not legally starve their servants, nor force them to go naked. Thus, what the right to food and clothing must have meant in this case was food and clothing *comparable to that received by the new wife*.

If her husband did not treat the concubine equally, then she could leave his household free of charge. She could not be legally compelled to remain in her husband's household if she could prove to the authorities that she was being treated as a second-class wife. In other words, her legal status as a free woman had been lost when her father sold her, but, once married, she became a wife who could not be overtly discriminated against. Her second-class legal status disappeared upon sexual consummation; only her second-class economic status remained. She could take no economic assets out of the marriage, other than her children, but other than this, she possessed equal status with her husband's other wives. Of course, she was tied to him economically to the extent that her lifestyle outside her husband's care might have looked even worse to her, and she possessed no dowry. Nevertheless, she retained the formal legal right to leave his household. Her father kept the original purchase price, and she went free.

3. Keeping the Children

Would she have been able to bring her children with her? It could be argued that the concubine would have had to leave her children

behind, for children of a bondservant wife stayed with the master when the servant left (Ex. 21:4), and the master in this case was her husband. But this would miss the point. The children did go with the concubine when her former slave husband redeemed her. The ex-slave husband's payment of the redemption price (bride price) to his former master made her his wife rather than a concubine, for her children served as her dowry. Hagar took Ishmael when she was forced out of Abraham's household (Gen. 21:9–14). She was not divorcing Abraham because he had refused her anything; rather, he was divorcing her. Sarah's decision to remove Ishmael from Abraham's household and from any inheritance necessarily involved Abraham's divorce of Hagar; otherwise, Abraham possessed no legal authority to send Ishmael out of his household. Abraham disinherited Ishmael. How? *By revoking the adopted status of Ishmael's mother*. Ishmael then became a member of his mother's household, not Abraham's.

Does this mean that children should today go with their lawfully divorced mother? No. The Old Testament allowed husbands to divorce wives for reasons other than the wives' commission of capital crimes (Deut. 24:1). Jesus said that such a law had been given by Moses because of the hardness of their hearts (Matt. 19:8).[20] The new Testament requirement is far more rigorous: only the capital crimes of the Old Testament serve as lawful grounds of divor-ce—in effect, divorce by *covenantal death*.[21] Covenantally dead people should not be allowed to take their children with them. The children should remain with the innocent injured party.

Upon what legal principle could the mistreated concubine have taken her children with her? By an appeal to her own legal status. The legal basis of the marriage had been her adoption into the master's family. By the husband's treating her in such a way that she had legally regained her freedom, she was no longer an adopted member of his family. As the innocent victim, she had reclaimed her former legal status. *Biblical law always defends the innocent party*. She would therefore keep the children when she left her husband's household. She would then be in the position of a widow who was the head of her own household (Num. 30:9). *The legal issues in biblical covenant arrangements are based on ethics, not blood or biology*. Her husband had

20. Gary North, *Hierarchy and Dominion: An Economic Commentary on First Timothy*, 2nd ed. (Dallas, Georgia: Point Five Press, [2001] 2012), Appendix A:D:2.

21. Rushdoony, *Institutes*, pp. 401–15; Ray R. Sutton, *Second Chance: Biblical Blueprints for Divorce and Remarriage* (Ft. Worth, Texas: Dominion Press, 1987).

not treated her righteously. If she remained single and outside any man's household authority, she became both father and mother to her children, just as a widow became.[22] If she remarried, the new husband adopted her and her children into his family. If she returned to her father's house, he became the true father of her children. *Fatherhood in all cases was by adoption, not biology*. This legal principle reflects our own covenantal status before God: we are either disinherited children because of Adam's sin, or else we are adopted children in God's household because of Christ's death and resurrection (John 1:12).

4. A Woman Without Capital

Then in what visible way was a former concubine different from a former wife? Only in terms of her capital. She took no dowry with her when she left, for she had brought no dowry to the marriage when she came. A bride price transaction without a dowry for the daughter in fact was *a servant purchase price*. A concubine had no personally held economic protection. If treated unequally compared to another wife, she could return to her father's household, and she could marry again. She could also remain single and alone, although that was rare in any agricultural society, except for a few urban occupations such as tavern-keeping and prostitution, and the court would probably remove her children from her if she became a prostitute. Nevertheless, an honest, moral woman was legally able to leave her husband's house with her children: her new dowry.

She could return to her father's household without a sense of becoming a needless burden, because her father had been paid. He had kept all of the bride price, which made it more strictly an economic transaction. She had borne the risk of winding up with a husband who mistreated her, so her father could have no legitimate complaints about her returning home.

E. New Testament Applications

Jesus Christ paid the bride price to God through His death at Calvary. This is the basis of His marriage to the bride, the church. It is also the basis of all marriages through God's common grace.[23] Christ paid the

22. If the Numbers 30:9 principle governed her, meaning that she refused to return to her father's house, she became both father and mother. She became a daughter of God, which is why a widow was allowed to take a vow before God without getting approval from anyone. Her legal subordination to God no longer required a visible male head of household as her representative. Biblically, Jesus Christ became her intermediary.

23. If we do not maintain that Christ's payment of the bride price is the foundation

bride price for all of humanity, for each individual, for Old Covenant Israel, and for New Covenant Israel. It was the highest price that has ever been paid. Old Covenant Israel looked forward to this payment, while New Covenant Israel now looks backward.[24] This is the proper New Testament starting point for any discussion of the bride price.

One conclusion is inescapable: *there are no more concubines in the New Testament economy*. That institution was done away with by Calvary. If concubinage were still lawfully in force, it would point away from Christ's definitive overcoming of mankind's slavery to sin, the ultimate form of bondage. Permanent servitude, except as a criminal penalty (restitution), is no longer biblically sanctioned as a valid institutional arrangement.

1. Adoption and Legal Status

The concubine's second-class legal status always ended with the consummation of the marriage. It applied only to the betrothal period. The whole imagery of the marriage supper of the lamb[25] points to the status of the church as a free woman, a full bride in legal possession of a vast dowry, the whole earth.[26] There are no slave wives any more; all lawfully married women are regarded by God as having entered marriage as free women. They gained their status as free women by means of Christ's payment of the bride price at Calvary. This payment serves as the legal basis of *God's adoption of His people into His eternal family*. The covenantal distinctions between the betrothed slave wife and the betrothed free wife have disappeared. "For as many of you as have been baptized into Christ have put on Christ. There is neither Jew nor Greek, there is neither bond nor free, there is neither male nor female: for ye are all one in Christ Jesus" (Gal. 3:27–28). Galatians 4 is the chapter above all others in the Bible that deals with spiritual adoption—"the adoption of sons" (v. 5)—and our deliv-

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of all marriages through common grace, then we must conclude that there is still a valid form of concubinage among non-Christians. We would have to argue that only Christian brides are exempt from the requirements of the bride price/dowry system.

24. Self-professed Old Covenant Israelites (the Jews of today), described in Romans 11 as the branches that were cut off (v. 17–19), still look forward to this payment, but God requires them to join themselves to the church and begin to look backward. There is only one bride, the church of Jesus Christ. God is not a polygamist. The old bride, national Israel, was executed for her whoredoms in A.D. 70. See David Chilton, *The Days of Vengeance: An Exposition of the Book of Revelation* (Ft. Worth, Texas: Dominion Press, 1987).

25. Gary North, "The Marriage Supper of the Lamb," *Christianity and Civilization*, 4 (1985).

26. Gary North, *Inherit the Earth: Biblical Blueprints for Economics (Ft. Worth*, Texas: Dominion Press, 1987).

erance out of the family of the bondwoman into the family of the free woman, the "Jerusalem which is above" which is free, "the mother of us all" (v. 26). The church rather than the family is the agency of covenantal adoption in New Testament times. It is the agency that publicly represents the new birth.[27]

The justification of divorce for the concubine was that her husband treated another wife with greater favor. The New Testament's standard is monogamy, for only through membership in Christ's bride, the church, can people find salvation. God is not a bigamist; Israel as a bride has been lawfully divorced because of her rebellion. He has not taken an additional new wife; the church is the replacement for the lawfully divorced wife. Israel must become part of the church if she is ever to regain her status as bride (Rom. 11). Therefore, men are not supposed to be bigamists. Monogamy was the legal standard for Hebrew kings (Deut. 17:17), and this "one wife" standard is explicitly stated as a requirement for church elders (I Tim. 3:2).

Brides can no longer legally be offered for sale by fathers. Fathers are no longer allowed to demand a bride price as a condition of a daughter's marriage. Institutionally, there is no longer any necessity for the bride price, except in cases of criminal penalties imposed by the church or state on offending males in cases of the seduction of a virgin.[28] Church symbols and church discipline have replaced the original functions of the bride price/dowry system. First, baptism and church membership have become the screening devices. Second, baptism and church membership also have become the evidence of covenantal subordination to the family of God. Third, various economic contracts and legal provisions for the protection of the innocent victim of a divorce become the proper protective devices. Finally, husbands are not allowed to take extra wives, so there is clearly no purpose in establishing special divorce laws to protect a concubine who is not being treated equally to the new wife.[29]

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27. In churches that fully honor this principle, infants are baptized. Parents hand over the infant to the pastor, who then baptizes it, and hands it back. This is the public symbol of the inability of parents in their own strength to give eternal life to their children. The church adopts children publicly, and then hands them back to parents as the designated agents of the church—the covenanted, international, trans-historical institution known as the bride of Christ. This does not guarantee the continuing covenantal faithfulness of the children, but it does honor the legal principle that without adoption into the family of God, each person stands condemned before God.

28. See Chapter 47: "Seduction and Servitude."

29. There is this exception to the rule against divorce laws for concubines. If a polygamous culture converts to Christ, the missionaries would be foolish to impose mo-

2. From Circumcision to Baptism

Because daughters receive the covenantal sign of baptism, the New Testament's position is that in all but biological respects, *adult women are now covenantally equal with adult men*. The only exception is that women are not allowed to speak in church worship services (I Cor. 14:34). Circumcision as a required rite is no longer binding in the New Testament era. It is significant that Paul inserted his famous statement on the irrelevance of circumcision in the middle of his chapter on marriage: "Circumcision is nothing, and uncircumcision is nothing" (I Cor. 7:19a).

The locus of final earthly authority for approving a marriage has shifted from the family to the church. This is manifested symbolically by the fact that baptism has replaced circumcision as the covenantal sign of family membership. The bride's father therefore no longer serves as the "circumciser" of the bridegroom, for the rite of circumcision no longer has any role to play covenantally. The church is the ultimate marital screening agent today for covenant-keepers.

A father who prohibits his daughter from marrying can be overruled by the church or churches to which the communicant prospective partners belong. The idea that a non-Christian father can lawfully and legitimately prohibit his Christian daughter from marrying a Christian man is outrageous theologically. The assertion that the couple is legally defenseless, and that they must confine their efforts to praying that her father will change his mind, is an indirect attack on the legitimate authority of the church.[30] Similarly, a father may authorize the marriage of his Christian daughter to a pagan young man, but the church can lawfully before God veto the proposed marriage and place the daughter under discipline if she follows her father's advice. She cannot biblically claim her father's authorization of the marriage as somehow validating it.

The abolition of concubinage did not abolish the covenantal principle of hierarchy. *Someone must represent the bride*. Who represents the

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nogamy retroactively on existing polygamous households. The husbands would then throw wives out of their homes, whether they wanted to stay or not. Who would protect or remarry these divorced wives? They would be tempted to become prostitutes. In such mission situations, biblical law would protect concubines who were subsequently treated as second-class wives. They could lawfully leave their husbands if they chose to.

30. In effect, such an argument makes a father the equivalent of the Pope. It is odd that Protestants sometimes use such arguments, for such a view of paternal authority transforms the New Testament family into a pagan, patriarchal, humanistic institution, one whose standards are autonomous, governed by neither church nor state.

girl in the name of Jesus Christ in today's marriage arrangements? Obviously, the girl's father does, unless the church has intervened to sanction the marriage if her father has immorally denied permission. *But the father represents his daughter as the agent of the church rather than as the agent of the bloodline family*. The church, as the true covenantal family of the God-adopted believer, retains its sanctioning authority. It is this *fundamental transfer of authority from the family to the church*, as symbolized ritually by the abolition of circumcision and the substitution of baptism, that has made the bride price and dowry legally optional. Christ has paid the bride price for His church, and His church now has become the locus of primary covenantal authority for conducting marriages, enforcing the terms of the marriage covenant, and screening the prospective partners. The bridegroom submits himself to the jurisdiction of the church.

We have seen that the bride price-dowry system was part of a program of inheritance. The daughter received a dowry in lieu of receiving her share of her father's inheritance. Her marriage relieved her of the requirement to support her aged parents. I am arguing that Christ's establishment of His church has made optional this transfer of funds. The church has become the new screening agent. This raises fundamental questions concerning family inheritance. Does this mean that the church becomes the primary agent for the care of older people, replacing the children? No. The church does become the agent of last resort if families fail in their responsibilities. Older widows (age 60 and older) whose families fail to support them are to be supported by the church (I Tim. 5:9–10).[31] Family members of such widows thereby identify themselves covenantally as infidels (v. 8), and would be excommunicated. The church then becomes the covenantal kinsman-redeemer of the widows.

Today, sons and daughters inherit. They both receive expensive educations. Daughters also share in the various responsibilities of caring for aged parents, to the extent that daughters possess independent capital. Their husbands know that they may be called upon to assist aged in-laws. There is no clear line of authority for establishing institutional responsibility for aged parents, nor is there a clear structure of inheritance. It was far easier to establish such responsibility when blood lines and gender determined inheritance. Inheritance in the New Testament is expressly covenantal rather than familistic.

31. Gary North, *Hierarchy and Dominion: An Economic Commentary on First Timothy*, 2nd ed. (Dallas, Georgia: Point Five Press, [2001] 2012), ch. 7.

This blurs the formal, legal lines of economic responsibility.

Membership in the church is of far greater consequence than membership in the family. Jesus was at war with any view of the human family that elevated it to equality with the church. "For I am come to set a man at variance against his father, and the daughter against her mother, and the daughter in law against her mother in law. And a man's foes shall be they of his own household" (Matt. 10:35–36). The biblical economic goal is to increase the dominion of Christians, not families as such; the institutional focus is on the kingdom rather than the family. Thus, parents should not leave great wealth to apostate children. Parents should normally leave their wealth to believing children, *assuming* that the children are economically competent and faithful to the external requirements of the covenant. If they are not, then parents should consider setting up trusts governed by competent church members. The only exception to these guidelines is where the apostate children give evidence that they are lawful, parent-honoring, responsibility-affirming people who are far more competent economically than the family's creed-affirming children, and who appear to be willing and able to support the aged parents. As a matter of self-defense, parents would transfer sufficient wealth to these children to compensate them for the expected future burden of caring for them in old age. Unbelieving children who abide by the external terms of the covenant are to this extent sanctified—set apart—by believing parents.

Parents must use their wealth to endow those who will carry their religious vision into the future, though not necessarily their names. Covenantally faithful daughters should inherit. Christian charities should also inherit. The Christian vision is far broader than family or tribe. The transfer of the kingdom to the "nation" of the church (Matt. 21:43)[32] testified to this shift in sovereignty away from tribal, regional, and even familial groups.

3. Inheritance or Dowry?

Because of their change in covenantal status in the New Testament, there is no reason to believe that daughters should not inherit, even if they have brothers. Sisters without brothers were allowed to inherit in the Old Testament: the case of the daughters of Zelophehad. Because of the operation of the jubilee land tenure law, daughters who inherited were required to marry only inside the tribe of their

32. Gary North, *Healer of the Nations: Biblical Blueprints for International Relations* (Ft. Worth, Texas: Dominion Press, 1987), Introduction.

fathers (Num. 36:8).[33] With Jesus' fulfillment of the jubilee law (Luke 4),[34] and with the destruction of Israel in A.D. 70, these restrictions on inheritance disappeared. Nevertheless, family responsibilities did not disappear just because tribal responsibility did. If daughters can lawfully inherit, then *daughters who inherit and their husbands necessarily become legally responsible for the care of her aged parents*. Thus, the husband of a daughter who prefers to inherit rather than accept a dowry should legally agree in advance to become equally liable for the care of her parents as any of her brothers. Because the West ignores such responsibilities, it has ignored these sorts of legitimate family legal contracts. As a result, families have not been careful to take care of aged parents. This furthered the expansion of the welfare state, for its proponents have successfully appealed to guilt-ridden voters in the name of indigent aged parents. The welfare state has steadily made itself the primary heir.[35]

The dowry is legitimate, though not required, as an alternative to inheritance. If a father decides to pay for the education of his daughter, he should tell her in advance the terms of the arrangement. If this is not her dowry, but is instead an advance payment of her lawful inheritance, then he need not seek to collect a bride price from her future husband, but she and her husband will be expected to bear their share of the costs of supporting the parents in their old age. If her education or a very expensive wedding is her dowry, this constitutes a formal admission on her part and on the part of her husband of their obligation to repay him in the form of a bride price—highly unlikely in our day—either before the marriage or in the years following the marriage.

Because the bride price is seldom paid today, daughters and bridegrooms implicitly do become responsible for the support of her parents. Such implicit support is no longer regarded as enforceable by civil law, however. Thus, the state has steadily encroached on the family as the primary agency for the support of aged parents. Taxes have replaced both the bride price and financial support by children. There has been no escape from these biblical economic and legal responsibilities; there is only a shift in institutional authority for collecting and distributing the funds.

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33. Gary North, *Sanctions and Dominion: An Economic Commentary on Numbers*, 2nd ed. (Dallas, Georgia: Point Five Press, [1997] 2012), ch. 22.

34. Gary North, *Treasure and Dominion: An Economic Commentary on Luke*, 2nd ed. (Dallas, Georgia: Point Five Press, [2000] 2012), ch. 6.

35. Chapter 25.

4. Alternatives to the Dowry

The economic consequences of divorce are the big economic problem that has arisen from the disappearance of the bride price and/or dowry system. When the husband walks out of the marriage, all he generally is required by law to pay is child support. Alimony payments to wives have become far less common in the United States since the mid-1970s. Divorced wives receive very little, except in cases where there is a major distribution of property. Few families possess that much debt-free property to divide. There is a slogan that says that "the husband gets the mortgage, and the wife gets the house." Then the husband stops paying on the mortgage, and the lending institution gets the house. At the youngest child's eighteenth birthday, the father's responsibility ends. The wife and her parents are cut off.

If there were not so much debt in society, then community property laws would protect wives far better. By requiring the husband to forfeit half of their property to the divorced wife, the state does act as an intermediary. What should be required, however, is the honoring of the biblical principle of *covenantal death*. The offending party should take nothing; the injured party should keep everything, including all the children. The offending party should not even be given visitation rights. If biblical law were enforced, the offending party would often be publicly executed. Only because the state has been negligent in its duty to enforce the biblically required standards and sanctions have divorce settlements become a problem. Community property laws—the automatic division of family assets—were the precursor of no-fault divorce, which in a debt-ridden society is another way of guaranteeing the impoverishment of divorced wives.

One way to protect the daughter and her parents would be for the church (which becomes ultimately liable economically for indigent members) to require the prospective bridegroom to agree in writing to give his wife sufficient funds for her to take out a term life insurance policy on his life. The policy would be owned by his wife or owned by a diaconate-managed trust in the name of the wife. He would do the same for her parents, with the premium money being given by the bridegroom to both wife and parents in advance of the wedding. He would sign the policy immediately after the wedding ceremony: no signature, no consummation. A refusal to sign would annul the marriage. He would not own the policy; therefore, he could not name new beneficiaries, or cancel the policies, should he walk out of the marriage. He would subsequently pay additional annual

premiums each year, so that the paid-up policies would be extended over time, or new policies be purchased.

Another way to reduce the likelihood of his walking out is to require him to agree in advance to create irrevocable trusts for his wife each time the couple buys any major investment, with her father or the diaconate as the trustee. Everything they buy that costs over, say, five ounces of gold during the first decade of their marriage is placed into this trust. The father-in-law should require the son-in-law to agree in writing to put at least ten percent of his salary into an automatic savings account inside the wife's trust. The husband would be legally allowed only to suggest where this money should be invested. Her brother (or someone covenantally responsible) would be named in the trust as the successor trustee, in case of the father-in-law's death.

All of this today would be regarded as "crass" and "mercenary." So was the bride price and dowry system of the Old Testament. The system offered economic protection to the economically vulnerable.

5. Freedom and Risks

All women in New Testament times have been freed from the Old Testament's requirement of bringing dowries into their marriages in order to avoid the second-class status of concubinage. This testifies to their status as wives whose bride price has been paid. The economic reality of this transformation was not visible in history for many centuries, but only because Western capitalism had not made it economically feasible for most young women and young men to leave home and marry, with or without parental financial support. The growth of highly urbanized capitalism changed this picture in the twentieth century. This development has placed heavy new economic and moral responsibilities on the shoulders of single adult women. With greater authority inevitably comes greater responsibility. They can set the terms of their own marriages. What we have seen is that they have proven to be tragically incompetent bargainers. No one represents them any more. With the rise of no-fault divorce, not even the civil government protects their interests any longer. In the United States in the mid-1990s, one year after a divorce, the woman's standard of living had fallen by about 30%, while her former husband's living standard may have risen by 10%.[36]

36. Associated Press story, *St. Louis Post Dispatch* (May 18, 1996); reproduced in *Christian News* (May 27, 1996), p. 3.

To ignore these economic realities in the name of formal biblical law would be foolish. The dowry is not legally required in order to avoid concubinage, because concubinage is no longer a biblical office, but this does not solve the economic problem of the economic vulnerability of wives, especially in an increasingly humanistic civilization in which divorce is regarded as some sort of opportunity to escape responsibility—an economic subsidy to lawless, irresponsible males if there ever was one. When husbands walk out of a marriage, leaving the care of children to the wives, as well as the wives' support of themselves, the division of labor is restricted. Wives must become self-supporting, even when husbands pay child support, and in millions of cases, they refuse. With this contraction of the division of labor, wives' personal productivity necessarily falls, and therefore their net income falls. The husbands find younger wives to marry, but divorced wives over age 35 with children seldom find husbands. The majority of divorced husbands win; the majority of divorced wives lose. Thus, wives without dowries are still unprotected economically, just as they were in the Old Testament. The difference is, concubines had biblical laws to protect them in the Old Testament. So did their aged parents. Today, these economic problems must be dealt with early by voluntary contract rather than by civil law. They seldom are, except in second marriages[37] or in cohabitation. In the latter cases, women recognize more clearly how vulnerable they are legally and economically.

Conclusion

The Old Testament authorized two forms of marriage contracts: free marriage and concubinage. The free wife brought a dowry into the marriage; the concubine did not. Both forms of marriage were lawful, but concubinage was less desirable. It left wives far more vulnerable to divorce or neglect by husbands.

The bride price was a requirement for marriage. If the father used the money to endow his daughter, she entered the marriage as a free woman. If he kept the bride price for himself, she entered as a concubine. The system allowed poor girls to escape from a life of poverty in their fathers' households.

The basis of Old Testament marriage was adoption. In effect, it was a symbol of the new birth, which is also a covenantal adoption

37. Georgia Dullea, "Prenuptial Agreements the 2nd Time Around," *New York Times* (June 7, 1982).

(John 1:12). The bridegroom adopted the girl into his family. He had to gain the cooperation of her father in this transfer of family membership from her family to his. Fathers used the bride price system to screen out bridegrooms who were more likely to be economically irresponsible. When fathers transferred to bridegrooms their covenantal office as God's representative for their daughters, they wanted some visible sign that the recipient would be responsible. The payment of the bride price was a manifestation of the bridegroom's competence and also a symbol of his subordination to the girl's family.

The New Testament annulled the bride price system by transferring the marital adoption process to the church. There are no lawful concubines today. Christ's payment of the bride price to God the Father at Calvary marked Him as the Bridegroom of the true bride, the church. The church is today the appropriate agency of the covenantal adoption process of marriage. Like God, who found abandoned Israel as an infant and raised her, and later married her (Ezek. 16), so the church baptizes children and then later sanctions the human marriage bond that reflects Christ's love of His church (Eph. 5:22–33). Christian fathers still screen prospective bridegrooms, but as delegated agents of the church rather than as agents of the extended bloodline family.

The church is the ultimate protector of unlawfully divorced wives. The preaching of the gospel is to lead to the rewriting of the divorce laws. The legal structure should protect the innocent partner and impose heavy sanctions on the offending partner, up to and including the death penalty for capital crimes identified by the Bible. The state should recognize in its statutes that biblical divorce is always and only by death, and this includes covenantal death.

When marriage partners are not Christians, the state should become the judicial sanctioning agency, for its laws also govern marriage and divorce. It becomes the primary agency by default. The state alone possesses the lawful monopoly of violence. It can punish those who disobey certain of God's standards, including certain aspects of marriage. The family no longer possesses any legal authority to marry or divorce couples. Fathers can lawfully prevent marriages under some circumstances, but they cannot perform lawful marriages simply and solely because they hold the office of father.

33

EXECUTING A REBELLIOUS SON

And he that smiteth his father, or his mother, shall be surely put to death.

EXODUS 21:15

And he that curseth his father, or his mother, shall surely be put to death.

EXODUS 21:17

The theocentric principle here is obvious: God the Father must not be attacked by His children. Parents are God's covenantal agents in the family, which is a hierarchical, oath-bound covenantal institution. They are God's covenantal *representatives* in the family. To strike an earthly parent is the covenantal equivalent of striking at God. It is an act of moral rebellion so great that the death penalty is mandated by biblical law.

In a parallel passage in Deuteronomy 21, Moses laid down the following law. If a son is morally rebellious, and he refuses to obey his father or mother, the parents jointly are required to bring him into civil court. The parents must testify against their son. The son is a glutton and a drunkard. That is, *he is a fully responsible adult*. The citizens are required to stone him to death (Deut. 21:18–21).

This law had nothing to do with tribal separatism (seed laws) or the inheritance of tribal land (land laws). It was not a priestly law. So, it was a cross-boundary law. Therefore, it is still in force.

It did have impact on inheritance. The biblical principle of inheritance is this: the wealth of the wicked is laid up for the just (Prov. 13:22).[1] A rebellious son should mot inherit. This would reverse

1. Gary North, *Wisdom and Dominion: An Economic Commentary on Proverbs*, 2nd ed. (Dallas, Georgia: Point Five Press, [2007] 2012), ch. 41.

the biblical order. The wealth of the just is not to be laid up for the wicked.

A. Agents of Society

Both parents are required by biblical law to bring a covenant lawsuit against their rebellious son.[2] This double witness is sufficient to convict. As I explain in my comments on this passage, the parents act as agents of God, but also as agents of the holy commonwealth. Their son is a criminal, as defined by biblical law. He is a rebel. The family is not authorized to execute him. This authority belongs to the civil court. So, the parents are required to bring formal charges against him. Not to do this is to transfer onto society the risk of becoming the son's victim. They possess intimate knowledge of his moral character. They are to act as defenders of the community by charging him with a crime. They have a moral and legal obligation to act as covenant lawsuit initiators.[3]

Because they possess detailed knowledge of his character and behavior, they are the first line of defense against the spread of rebelliousness. They must defend their own authority inside their household, but their responsibility goes beyond the household. They are agents of the court. The court cannot know as much as they do about their son. A court that attempted to gather this degree of knowledge would exercise tyrannical power. So, God has mandated parents to act on His behalf in protecting the society against rebellion. God does not authorize parents to impose capital punishment. Instead, He has announced the parents' responsibility to bring their son before the court.

In other laws to which execution is mandated, the victim decides, if he is an adult and if he is still alive, i.e., not the victim of murder. Yet in this case, the state must execute. Few parents wiuld cooperate on their own authority, meaning on behalf solely of themselves. The existence of capital punishment is evidence that the parents are acting as agents of the court. What the son has done to them is evidence of what he will do to others outside his family. The parents are therefore required to bring him to trial.

What if they refuse to bring a formal charge against their rebellious son? Then they have implicitly subsidized evil behavior. They

2. On the covenant lawsuit, see Appendix M, Section J.

3. Gary North, *Inheritance and Dominion: An Economic Commentary on Deuteronomy*, 2nd ed. (Dallas, Georgia: Point Five Press, [1999] 2012), ch. 51.

have implicitly *sanctioned* it. They know that they are risking the possibility that he will become an incorrigible adult. If he does, they will lose him anyway. Better to bring him before the civil court early. Better to obey God. Better to avoid God's sanctions against the family for the parents' refusal to obey. The son may learn fear of the civil court even though he has no fear of the family court.

If they bring him several times, the court will undoubtedly recommend increased sanctions. He has been identified as an incorrigible youth. The day that he commits a crime against someone outside his family, the court will be able to demonstrate to the victim that leniency is no solution, that this man is a habitual criminal. Thus, by allowing parents to insist on the death penalty, but by also allowing them to be lenient, God encourages parents to identify rebellious sons before the latter become incorrigible criminals. The court can take steps to enforce parentally recommended sanctions before it is too late.

B. Restricting a Criminal Class

The law in Deuteronomy, Rushdoony argued, is a law against the development of a professional criminal class. "But the godly exercise of capital punishment cleanses the land of evil and protects the righteous. In calling for the death of incorrigible juvenile delinquents, which means, therefore, in terms of case law, the death of incorrigible adult delinquents; the law declares, 'so shalt thou put evil away from among you; and all Israel shall hear and fear' (Deut. 21:21)."[4] His mistake was to see this as specifying juvenile delinquents. It was a law against adult sons: drunkards and gluttons.

Such a son was a physical threat to his parents. The law in Exodus 21 refers to violence. This is not a law against a young child who hits a parent. The parent can hit back, and should. The child must learn early that striking a parent is a serious crime. The should point to this case law as evidence. If the civil government has executed a few sons for this crime, the parents can point to this as a warning. The threat of execution is a powerful warning.

The Mosaic case laws were all warnings. This warning was directed against physical rebellion. The son who is willing to injure a parent is a threat to the social order. Biblical society has a moral obligation and the legal authority to remove such citizens from history. The state must execute.

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4. R. J. Rushdoony, *The Institutes of Biblical Law* (Nutley, New Jersey: Craig Press, 1973), pp. 77–78; cf. p. 188.

Conclusion

A mark of rebellion is this crime: physically striking a parent. This indicates the presence of a hardened criminal. These two case laws provide society with a tool to remove such rebels from their midst. Once rebellion has gone so far that a son strikes or curses a parent, it must be removed. This removal is attained on a permanent basis through public execution.

34

KIDNAPPING

And he that stealeth a man, and selleth him, or if he be found in his hand, he shall surely be put to death.

EXODUS 21:16

In Appendix M, I present my thesis that the pleonasm, "he shall surely be put to death," is binding on the civil authorities whenever the state initiates the prosecution of the covenant lawsuit, but it does not bind the victim when he initiates the prosecution solely on his own behalf. We must examine the implications of this principle in the case of kidnapping, a crime that is bound by the terms of the pleonasm.

A. The Nature of the Crime

Before getting to this problem, however, we must search for the theocentric principle that governs the crime of kidnapping. James Jordan quite properly listed kidnapping under the general heading of *violence*. The nature of violence biblically is that it represents an attempted assault on God, an attempt to murder God by murdering His image.[1] He listed other aspects of violence: the desire of sinful men to play god, the desire to achieve autonomous vengeance, and sado-masochism.[2] Violence should be understood as a sinner's rebellious attempt to achieve dominion by power.[3] It is a form of *revolution*. The preaching of the gospel is intended to reduce violence.

Ultimately, this crime and its civil penalty should be understood

1. James B. Jordan, *The Law of the Covenant: An Exposition of Exodus 21–23* (Tyler, Texas: Institute for Christian Economics, 1984), p. 93.

2. *Ibid.*, pp. 93–96.

3. *Ibid.*, p. 95.

in terms of the assumption of a *theocentric* universe. Jordan's assessment is valid: "The death penalty is appropriate because kidnapping is an assault on the very person of the image of God, and as such is a radical manifestation of man's desire to murder God. Like rape, it is a deep violation of personhood and manifests a deep-rooted contempt for God and his image."[4]

Nevertheless, the crime of kidnapping goes beyond the question of the image of God in man. Kidnapping is more than an assault against God's image in man. It is not simply man's blood that is inviolate (Gen. 9:6); it is also his life's *calling*. It is not simply his image that commands respect from other men; it is also his *God-ordained assignment in life*. Perhaps it would be better to argue that man's *imaging* also includes the *calling*. God is revealed in Genesis 1 as a God who works and who judges. Man images this God. Kidnapping is therefore an assault on both of these aspects of man's imaging.

Who is the true owner of the kidnapper's victim? God is. God owns the whole world (Ps. 50:10).[5] Nevertheless, stealing a privately owned animal is not a capital crime (Ex. 22:1).[6] Why the special case of a man? The answer is found in man's special position: subordinate under God and possessing authority over the creation. Man is made in God's image (Gen. 1:26;[7] 9:6). By interfering with a man's God-given calling before God, the kidnapper disrupts God's revealed administrative structure for subduing the earth. Each man must work out his salvation—or, presumably, work out his damnation—with fear and trembling (Phil. 2:12).[8] The kidnapper asserts his presumed autonomy and authority over the victim, as if he were God, as if he possessed a lawful right to determine what another man's responsibilities on earth ought to be.

B. The Death Penalty

The Bible recognizes that there are two potential criminals involved in kidnapping: the actual kidnapper and the person to whom he sells the victim. The international slave trade did exist. The passage deals with both types of criminal: "And he that stealeth a man, and selleth

4. *Ibid*., p. 104.

5. Gary North, *Confidence and Dominion: An Economic Commentary on Psalms* (Dallas, Georgia: Point Five Press, 2012), ch. 10.

6. Chapter 43.

7. Gary North, *Sovereignty and Dominion: An Economic Commentary on Genesis* (Dallas, Georgia: Point Five Press, 2012), ch. 3.

8. Gary North, *Ethics and Dominion: An Economic Commentary on the Epistles* (Dallas, Georgia: Point Five Press, 2012), ch. 20.

him, or if he be found in his hand, he shall surely be put to death." Both the kidnapper and the recipient of the stolen victim are subject to the death penalty.[9] Slave traders were at risk.

The obvious problem with a universally mandatory death penalty is that a crime whose effects are less permanent than murder bears the same permanent penalty that murder does. Consider the case of kidnapping. The kidnapper has a strong incentive to kill the victim if he thinks that the authorities are closing in on him. The victim may later identify him as the kidnapper; better to kill the source of the incriminating evidence. After all, the penalty for murder is the same as the penalty for kidnapping. A person can only be killed once by the civil government. Jordan recognized this problem.[10] So do humanist legal theorists.

Then why does the Bible specify the death penalty for kidnapping? Isn't this dangerous for the victim? Other ancient Near Eastern law codes—if we can accurately call them codes[11]—did not impose such a harsh penalty. The code of Hammurabi specified the death penalty for kidnapping only when an aristocrat kidnapped the young son of another aristocrat.[12] What lies behind the rigorous biblical penalty?

The Bible does not limit the death penalty to cases involving physical harm to the victim. The person who is kidnapped in order to be sold as a slave is not said to have been harmed. If anything, the kidnapper who intends to sell the victim into servitude has an economic incentive not to harm the victim, because an injury would presumably reduce the market value of "the property." Yet the kidnapper potentially faces the most fearful penalty that society can inflict. Why such a concern for this crime?

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9. Dale Patrick, *Old Testament Law* (Atlanta, Georgia: John Knox Press, 1985), p. 74.

10. James B. Jordan, *The Death Penalty in the Mosaic Law* (Tyler, Texas: Biblical Horizons, 1988), p. 17.

11. Shalom Paul cited the 1963 warning of his teacher, E. A. Speiser, regarding the famous Code of Hammurabi: "The handful of jurists . . . seem agreed that what we have before us is not properly a code or a digest but 'a series of amendments to the common law of Babylon' (Driver and Miles, *Babylonian Laws I*, p. 41)." Shalom Paul, *Studies in the Book of the Covenant in the Light of Cuneiform and Biblical Law* (Leiden: E. J. Brill, 1970), p. 3n. But Yehezkel Kaufman insisted that Deuteronomy "is unquestionably intended to be a law code in the ancient Near Eastern sense." *The Religion of Israel* (Chicago: University of Chicago Press, 1960), p. 46.

12. Hammurabi Code, paragraph 14: *Ancient Near Eastern Texts Relating to the Old Testament*, ed. James B. Pritchard, 3rd ed. (Princeton, New Jersey: Princeton University Press, 1969), p. 166.

C. Sacrilege

To steal from God is a sacrilege. Rushdoony made an interesting study of the meaning and implications of sacrilege, and his general comments apply in the case of kidnapping. "*Theft* is basic to the word, and sacrilege is theft directed against God. It is apparent from this that the idea of sacrilege is present throughout Scripture. . . . The concept of sacrilege rests on God's sovereignty and the fact that He has an absolute ownership over all things: men and the universe are God's property. The covenant people are *doubly* God's property: *first*, by virtue of His creation, and, *second*, by virtue of His redemption. For this reason, sin is more than personal and more than man-centered. It is a theological offense."[13] So serious is the crime of sacrilege that it is compared by Paul to adultery and idolatry (Rom. 2:22), both of which were capital crimes in the Old Testament.[14] (The code of Hammurabi specified the death penalty for those who stole the property of either church or state, and also for those who received the stolen goods.)[15]

Because sacrilege is theft, it requires restitution.[16] Because sacrilege is theft against God, it requires restitution to God. In this case, the crime is so great that the maximum restitution is the death of the criminal. No lower payment can suffice if the state prosecutes and convicts in God's name. The implied assertion of autonomy by the criminal, who seeks to play God, represents a form of idolatry, worshipping another God. The kidnapper steals God's property—a person made in His image—and seeks to profit from the asset. This is the essence of the crime of Adam, to be as God (Gen. 3:5).

D. Future Deterrence

The death penalty is final. Its beneficial effects for society are twofold: it restrains the judgment of God on society, and it provides a deterrence effect—deterring the criminal from future crime (he dies), deterring other criminals from committing similar crimes (fear of death), and deterring God from bringing His covenant judgments on the community for its failure to uphold covenant law (fear of God's

13. R. J. Rushdoony, *Law and Society*, vol. II of *Institutes of Biblical Law* (Vallecito, California: Ross House Books, 1982), p. 28.

14. *Ibid*., p. 31.

15. CH, paragraph 6; *Ancient Near Eastern Texts*, p. 166. There was an exception: if the person stole an ox or a sheep from church or state, he paid 30-fold restitution; it was tenfold restitution if the animal had belonged to a private citizen: CH, paragraph 8, *idem*.

16. Rushdoony, *Law and Society*, p. 33.

wrath). Capital punishment is God's way of telling criminals, whether convicted criminals or potential criminals, that they have gone too far by committing certain crimes. It also warns the community that biblical law is to be respected.

Obviously, there is no element of rehabilitation for the convicted criminal in the imposition of the death penalty. The state speeds the convicted criminal's march toward final judgment. The state delivers the sinner into the presence of the final and perfect Judge.[17]

If we interpret the presence of the pleonasm as making the death penalty mandatory, irrespective of the wishes of the victim, then we create a problem for the victim. *A mandatory death penalty may actually increase the risk to the victim, once the criminal act has taken place*. First, the victim may have seen the criminal. His positive identification of the kidnapper and his testimony against him can convict him. Second, should the criminal begin to suspect that he is about to be caught by the authorities, he may choose to kill the victim and dispose of the body. By disposing of the evidence of the crime, the victim loses his life, while the criminal reduces his risk of being detected. This is a good reason to suppose that the death penalty for kidnapping is a maximum allowable penalty, one which a victim can impose but need not impose on a convicted kidnapper.

What if the kidnapper has stolen more than one adult person? What if one adult victim asks the court to impose the death penalty, but the other victim asks for leniency? Or, if the kidnapper has stolen more than one minor, what if the parent or legal guardian of one asks for the death penalty, but the parent or legal guardian of the other recommends leniency? The victim who demands execution is sovereign. The extension of mercy is not mandatory. The pleonasm of execution is attached to this law. The presence of the pleonasm indicates that capital punishment is the normal sanction. Anything less than execution is abnormal: a unique sign of leniency by the victim. The victim who specifies execution is adhering to God's written law. He is upholding the sanctity of the sanction against sacrilege. His decision is final.

17. One reason why the torture of a convicted criminal prior to his execution is immoral is that it symbolically arrogates to the state what God reserves exclusively for Himself: the legal authority to torture people for eternity. It is a right that God exercises exclusively. By torturing a person prior to his execution, the state asserts that its punishments are on a par with God's, that the state's penalties are to be feared as much or more than God's. On the state as torturer, see Edward Peters, *Torture* (London: Basil Blackwell, 1985), ch. 5.

Can the state prosecute if the victim declines? Only if the state is itself a victim. It seems reasonable to allow the state to recover the costs of searching for the victim. The kidnapper has stolen from the state by his criminal act. If the state successfully prosecutes a kidnapper, judges can impose a double restitution penalty payment for the costs incurred. But the judges cannot lawfully impose the capital sanction. They must uphold the principle of victim's rights.

There is the possibility that in other circumstances, the threat of the death penalty may reduce the risk to the victim. A criminal in the Bible is allowed to go to the authorities before he has been caught and make a 20% restitution payment, plus the capital value of the stolen property or unpaid vow (Lev. 6:1–7). The kidnap victim in the Old Testament presumably would have been sold as a servant. The market price of this sort of servant could have been calculated in the Old Testament.[18] The judges could also have used the Bible's fixed price system for a servant killed by a goring ox: 30 shekels of silver (Ex. 21:32). Or perhaps the prices listed for human vows to the temple could have been used by the judges (Lev. 27:3–7). The Bible always offers opportunities for repentance. By allowing the kidnapper to escape the threat of the death penalty by surrendering to the authorities, biblical law reduces the threat to the kidnap victims in those cases where a kidnapper repents before he is arrested.

E. Ransom

But what about the modern form of kidnapping, where the kidnapper demands a ransom? The same principle operates: the repenting but as yet unarrested kidnapper offers to the victim the value of the ransom demanded, plus one-fifth. In most cases, this would mean a lifetime of servitude to repay the debt. Servitude for the kidnapper is better for the victim and society than what the modern criminal

18. Wrote the mid-nineteenth-century Jewish commentator S. R. Hirsch: "The value of any human life can not be expressed in pounds, shillings and pence. But atonement-money has to be paid in certain cases. This 'atonement-money' the token value of his own life, in the case of a free man, is estimated at the amount he would fetch if sold in the market as a slave. There is no other way of fixing the amount of human life in terms of hard cash." Samson Raphael Hirsch, *The Pentateuch Translated and Explained*, trans. Isaac Levy, 5 vols., *Exodus*, 3rd ed. (London: Honig & Sons, [1860s?] 1967), p. 323; at Exodus 21:32. This ignores another valid means of estimating a kidnapped man's hard-cash value: the ransom payment demanded by the kidnapper (what economists call "reservation value"). Another problem with Hirsch's restricted means of estimating a person's value is that today there is no lawful slave market operating. He must have known that this would complicate things for the judges.

justice system imposes. The modern criminal justice system would probably impose a life sentence in jail for the criminal, at the expense of taxpayers, with parole possible (likely) in a few years. The kidnap victim gets nothing.

There was a motion picture in 1956 called *Ransom*. The hero of the film is a rich businessman. His son is kidnapped, and the kidnappers demand a huge ransom. The police tell him that kidnap victims wind up dead about half the time, whether a ransom is paid or not. The father decides not to pay. He goes to his bank and gets the money demanded by the kidnappers. He then calls in the local television station, which broadcasts his announcement. In front of him on a desk is the money, in cash. He says to all those listening that if his son is murdered, he intends to pay every cent of the money to anyone who will tell him the name of the person who kidnapped his son. He offers to pay the accomplices to the crime. He reminds the kidnapper of the risk of relying on the reliability of his accomplices. He then points to the money and declares to the kidnapper, "This is as close to this money as you'll ever get." When he returns home, his neighbors are outraged. They throw rocks through his window. He had not shown filial piety. He deserves to be an outcast. But, at the end of the movie, his son is returned to him. The kidnapper was fearful of being turned in for the reward.[19]

What the movie's hero did was to place a greater priority on *bringing the criminal to justice* than he placed on public acceptance of his act. (The statistical risk to his son, he had been told, was the same, whether he paid the ransom or not.) By using the ransom money in a unique way—as a reward that would increase the likelihood of someone's becoming an informant—the father increased the odds in favor of his son's survival. (The majority of crimes are probably solved as a result of informants.)[20] He relied on the threat of punishment more than he did on the good will of the criminal in honoring the terms of the transaction, his son's life for a cash payment. He turned to the law for protection, not to the criminal's sense of honor.

In 1973, the grandson of J. Paul Getty, one of the world's richest men, was kidnapped in Italy. The kidnapping received worldwide attention. The kidnappers demanded over a million dollars as the

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19. The re-make of the movie in 1996 had a different ending. Only the scene with the money and the television was retained.

20. Edward Powell, "The Coming Crisis in Criminal Investigation," *Journal of Christian Reconstruction*, II (Winter 1975–76), pp. 81–83.

ransom.[21] Getty publicly refused to pay. He said that if he did, this would place his 14 other grandchildren in jeopardy. By not paying, he said, he was telling all other potential kidnappers that it was useless to kidnap any of his relatives. The kidnappers cut off the youth's ear and sent it to his mother. Still the grandfather refused. Privately, he lent $850,000 to the boy's father to pay the ransom—at 4% per annum. Getty never missed an opportunity for profit.[22] The gamble paid off: the kidnappers released him.[23] No other Getty relatives became victims.[24]

F. Equal Penalties or Equal Results?

The Bible does not forbid the victim's family to pay a ransom, but the threat of the death penalty makes the risk of conviction so great that few potential kidnappers would take the risk, except for a very high return. The average citizen therefore receives additional but indirect protection because of this biblical law. The penalty to the convicted kidnapper is so high that the money which the middle-class victim's relatives could raise to pay the ransom probably would not compensate most potential kidnappers for the tremendous risk involved. Presumably, kidnappers will avoid kidnapping poorer people.

In effect, *the threat of the death penalty increases the likelihood that members of very rich families or senior employees of very rich corporations will be the primary victims of kidnappers*. Also, in cases of politically motivated kidnappings, the famous or politically powerful could become the victims. They seem to be discriminated against economically by biblical law: high penalties make it more profitable for kidnappers to target their families. On the other hand, these people possess greater economic resources, making it more likely that they can more easily afford to protect themselves and their relatives.

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21. The price of gold was then about $100 an ounce.

22. Fellow billionaire industrialist Armand Hammer referred to him as "that tight old weasel." Armand Hammer (with Neil Lyndon), *Hammer* (New York: Putnam's, 1987), p. 386. Hammer did respect him as an entrepreneur, however.

23. 23 The grandson later suffered a stroke as a result of alcohol and drug abuse, and became paralyzed and blind. *Time* (March 17, 1986), p. 80.

24. I have instructed my wife never to pay a ransom for me under any conditions. I have also told her that I will not pay a ransom for her or any of our children. The goal is to reduce the risk of kidnapping before it takes place, not to increase the likelihood of the victim's survival. The evil of kidnapping should not be rewarded. It should be made devastatingly unprofitable. The same should be true for terrorist kidnappings. The original policy of the modern State of Israel regarding terrorist kidnappings was correct: a kidnapper-for-victims exchange before any victim is harmed, but no compromise thereafter.

From the point of view of economic analysis, the stiff penalty for kidnapping protects society at large, though not always the actual victim of the crime, and it protects the average citizen more than it protects the rich. The law applies to all kidnappers equally; it has varying effects on different people and groups within the society. Because the Bible requires *equality before the law*, it produces *different results*. To equalize the results—equal risk for rich families and poor families—the Bible would have to impose the death penalty only for kidnappers of rich people. This, as we have seen, is what Hammurabi's Code did: it imposed the death penalty only on those who kidnapped the sons of aristocrats. The economic payoff would have to be made lower in the case of a kidnapper who steals a poor person. Therefore, in order to put poor families at risk as high as that borne by rich families, the law would have to discriminate between kidnappers of the poor and kidnappers of the rich. But *the kidnapper sins primarily against God*, so the death penalty can be specified by the victim in both cases. God is not a respecter of persons, meaning those convicted of a capital crime. The question is not the economic status of the victims, but the nature of the crime (sacrilege) and the sanctions specified by the victims (victim's rights). Thus, a consistent application of this law in every case of kidnapping increases the risk of being kidnapped for the rich.

This brings up a very important question relating to the word "equality." When men demand equality, what do they really want? If they demand *equality before the law*—"Equal penalties for identical crimes, irrespective of persons!"—then they are simultaneously demanding *unequal economic results*. This is not true only in the case of the variation of risk for different economic groups when a society demands the death penalty for all kidnappers. This is true of the economy in general. When men demand *equal economic results*, they are simultaneously demanding *inequality before the law*. Hayek's analysis is correct.

> From the fact that people are very different it follows that, if we treat them equally, the result must be inequality in their actual position, and that the only way to place them in an equal position would be to treat them differently. Equality before the law and material equality are therefore not only different but are in conflict with each other; and we can achieve either the one or the other, but not both at the same time. The equality before the law which freedom requires leads to material inequality. Our argument will be that, though where the state must use coercion for other reasons,

> it should treat all people alike, the desire of making people more alike in their condition cannot be accepted in a free society as a justification for further and discriminatory coercion.[25]

Biblical law is clear: *equality before the civil law is the God-sanctioned concept of equality*. Equality of results does not apply to the sanctions that God imposes after a person dies, either positive sanctions or negative sanctions. The principle of *positive sanctions* is specified in I Corinthians 3:11–15: "For other foundation can no man lay than that is laid, which is Jesus Christ. Now if any man build upon this foundation gold, silver, precious stones, wood, hay, stubble; Every man's work shall be made manifest: for the day shall declare it, because it shall be revealed by fire; and the fire shall try every man's work of what sort it is. If any man's work abide which he hath built thereupon, he shall receive a reward. If any man's work shall be burned, he shall suffer loss: but he himself shall be saved; yet so as by fire." The principle of *negative sanctions* is specified in Luke 12:47–48: "And that servant, which knew his lord's will, and prepared not himself, neither did according to his will, shall be beaten with many stripes. But he that knew not, and did commit things worthy of stripes, shall be beaten with few stripes. For unto whomsoever much is given, of him shall be much required: and to whom men have committed much, of him they will ask the more."[26]

G. Time Perspective

The establishment of the death penalty is necessary to increase risk to the potential kidnapper—risk that is proportional to the magnitude of his proposed crime. By calculating in advance the permanent nature of the penalty (death), the criminal is forced to come to grips with the future. The criminal presumably is present-oriented.[27] Certainly, he ignores the eternal consequences of his acts. He generally lives for the moment. His long-term fate is total destruction on the day of judgment. He discounts this, refusing to act in terms of this knowledge. That day seems too far away chronologically, and God is

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25. F. A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), ch. 6:2.

26. Gary North, *Treasure and Dominion: An Economic Commentary on Luke*, 2nd ed. (Dallas, Georgia: Point Five Press, [2000] 2012), ch. 28.

27. Edward C. Banfield, "Present-Orientedness and Crime"; Gerald P. O'Driscoll, "Professor Banfield on Time Horizon: What Has He Taught Us About Crime?" in Randy E. Barnett and John Hegel III (eds.), *Assessing the Criminal: Restitution, Retribution, and the Legal Process* (Cambridge, Massachusetts: Ballinger, 1977).

not visible. "Perhaps God is not going to enforce the promised penalty. Maybe God doesn't even exist," the criminal thinks to himself. Therefore, God sets the civil government's penalty so high that even a present-oriented criminal will feel the restraining pressure of extreme risk, even if his psychological rate of discount is very high. The severity of the earthly punishment testifies to the severity of the eternal punishment. It serves as an "earnest" or down payment on eternity.

The Bible teaches us that history is linear. History has a beginning and an end. The Bible also teaches us that our thoughts, as well as our deeds, have consequences in history and also in eternity beyond the grave (Matt. 5:28). It tells men to redeem (buy back) their time (Eph. 5:16), to work while there is still light (John 9:4). If God-fearing people must be educated and motivated for them to believe such doctrines, then we have to come to grips with the reality of a world in which members of a criminal class reject all these doctrines. More than this: members of a professional criminal class self-consciously live in terms of *a rival set of attitudes* toward time, personal responsibility, and the consequences of human action.

The possibility of the death penalty for kidnapping forces the potential kidnapper to count the cost of his transgression. Remember, *a person's perception of total cost (including risk) is affected directly by his perception of time*. If men discount the future greatly, as Esau did with respect to his birthright, then they will accept low cash bids for future income.[28] Present-oriented men discount future benefits and future curses alike; the distant future is of very little concern to them. As Harvard political scientist Edward Banfield commented:

> At the present-oriented end of the scale, the lower-class individual lives from moment to moment. If he has any awareness of a future, it is of something fixed, fated, beyond his control: things happen to him, he does not make them happen. Impulse governs his behavior, either because he cannot discipline himself to sacrifice a present for a future satisfaction or because he has no sense of the future. He is therefore radically improvident: whatever he cannot use immediately he considers valueless. His bodily needs (especially for sex) and his taste for "action" take precedence over everything else—and certainly over any work routine.[29]

A law-order must recognize present-oriented people for what they are. The kidnapper may be somewhat more future-oriented than the lower-class man. He makes plans, counts costs, and takes risks. But

28. North, *Sovereignty and Dominion*, ch. 13:C, cf. ch. 26.
29. Edward Banfield, *The Unheavenly City Revisited* (Boston: Little, Brown, 1973), p. 61.

he discounts the long-term consequences of his acts. He does not care about the effects on the victim, his family, or the community. It is this *radical lack of concern for the lives and callings of other men* that makes him a menace to society. To catch his attention, to convince him of the seriousness of his crime, the Bible stipulates the death penalty. Richard Posner, an economist and also a judge for the U.S. Court of Appeals, acknowledged the validity of relationship between a criminal's time perspective and the need for capital punishment, but only in a footnote: "Notice that if criminals' discount rates are very high, capital punishment may be an inescapable method of punishing very serious crimes."[30]

The total discontinuity involved in the execution of the kidnapper favors *continuity in the lives of the innocent*. It is the innocent people of society who deserve continuity, not the kidnappers. The decision to prosecute, or to specify a penalty other than death, is in the hands of the victim or his survivors. The victim is allowed by biblical law to bargain with the kidnapper in order to obtain his freedom. (The kidnapper would have no way to get even with a victim who subsequently changed his mind and called for the death penalty.)

H. Kidnapping and the Slave Trade

The abolition of slavery has made kidnapping less profitable financially. Before slavery was abolished by law, the slave market offered a profit to kidnappers because *they could capitalize the entire working lifetime of the victim*. There were numerous buyers who were willing to bid against each other for the lifetime output of kidnap victims. Today, only families, major corporations, and civil governments are willing and able to buy back a victim, and very often not primarily because of the victim's earning power.

1. Free Market Demand

The slave trade existed for many centuries because of the ready market for its victims. The purchase of slaves by slave-buyers created the market price of the slaves, from ancient Greece until the not-so-ancient 1960s. As recently as 1960, in the words of Britain's Lord Shackleton, African Muslims on pilgrimages sold slaves on arrival, "using them as living traveller's cheques."[31] Slavery was officially out-

30. Richard Posner, *Economic Analysis of Law* (Boston: Little, Brown, 1986), p. 212n.
31. Cited by David Brion Davis, *Slavery and Human Progress* (New York: Oxford University Press, 1984), p. 317.

lawed in Saudi Arabia in 1962 and by Oman in 1970.[32] Nevertheless, though African slavery declined sharply in the 1960s, "slave-trading continued to flourish in Mauritania, Mali, Niger, and Chad, along the drought-stricken southern fringe of the Sahara."[33] As recently as 1981, the United Nations Human Rights Commission reported that there were 100,000 slaves in Mauritania. Other estimates place the total number of slaves at 250,000 among the nomadic tribes of the drought-ridden Sahel in North Africa.[34] The slave-owners are Moors (Islamic), while the slaves are blacks from Senegal. There are no open slave markets because the trade is officially illegal. The biggest part of the trade is in children. They belong to the owners of the mothers.[35]

A steady economic demand for slaves created the demand for new victims. The *slave traders*, so hated and despised in the eighteenth and nineteenth centuries by "respectable" English-speaking society, including most slave owners, and equally despised by slave-owning writers in the ancient world,[36] were, from a strictly economic point of view, nothing less than *the paid agents of the buyers*. They were performing specialized work as purchasing agents for slave-buyers. The Arab and native African kidnappers were, to that extent, merely the specialized collection agents of the slave-buyers. They were economic middlemen, entrepreneurs. The entrepreneur necessarily serves the wants of customers.

In every free market transaction, the potential customers for any economic good or service are competing with other customers for control over all scarce economic resources. They compete directly and indirectly for the final output of the economy. The outcome of this competition establishes prices, quality standards, and costs related directly to the production of all economic goods. The middlemen (entrepreneurs) simply serve those customers whose competing bids are expected to produce the highest profits. *Customers ultimately determine prices and therefore also costs*.[37] This economic process was no less true of the slave trade. It is one of the peculiar aspects of "the

32. *Ibid.*, p. 319.

33. *Idem*.

34. Roger Sawyer, *Slavery in the Twentieth Century* (London: Routledge & Kegan Paul, 1986), p. 14.

35. Bernard D. Nossiter, "U.N. Group Gets Report on Slaves in Mauritania," *New York Times* (Aug. 21, 1981).

36. Thomas Wiedemann, *Greek and Roman Slavery* (Baltimore, Maryland: Johns Hopkins University Press, 1981), pp. 6, 106–7.

37. Murray N. Rothbard, *Man, Economy, and State*, 2nd ed. (Auburn, Alabama: Mises Institute, [1962] 2009), ch. 5:8.

peculiar institution" of American Negro slavery that the "final consumers" refused to recognize their own personal responsibility, as economic actors and political voters, for the operations of the entire slave-delivery system.

What we should recognize here is the relationship between the abolition of compulsory slavery and the reduction of involuntary servitude for citizens in general. By making illegal the *market* for imported slaves, Western nations reduced the demand for imported slaves in the early 1800s. This in turn reduced the risk of being kidnapped for the average African.[38] A policy of state-enforced coercion against slave-buying reduced the profit-seeking private coercive activity of kidnapping Africans thousands of miles away.

This policy worked only because (1) the British navy enforced its regulations against the slave traders after 1807, (2) a majority of citizens in the recipient nations were steadily educated to reject the idea of the legitimacy of involuntary servitude, and (3) slavery's defenders were defeated on the battlefield, in the case of the American South in the 1860s. The economic lesson: disregarding the needs and preferences of slave-holders (the final users) by outlawing slavery led to the reduction of the entire slave trade. The profitability of the international slave trade was reduced. We learn that there are cases where state coercion is valid, when that coercion is directed against private coercers. The anti-slave trade legislation recognized the complicity of slave-owners (final users) in the coercive international slave trade. The market for slaves was not a free market, for the supply side of the transaction was based on coercion.

2. Monopoly Returns and Reduced Sales

There is a curious myth that laws against evil acts do not reduce the total number of these acts that criminals commit. Some critics even go so far as to argue that the very presence of the law subsidizes evil, in the case of laws against the sale of illegal drugs or laws against

38. This falling demand for imported slaves was offset by an increase in demand for legal, domestically produced slaves. This transformed some plantations into slave-breeding centers, especially in the Virginia tidewater region, where soil-eroding agricultural techniques had reduced the land's output, and therefore had reduced the regional market value of the human tools who produced the output. This region began to export slaves to buyers who cultivated the fresher soils of Louisiana and Mississippi. See Alfred H. Conrad and John R. Meyer, "The Economics of Slavery in the Ante-Bellum South," *Journal of Political Economy*, LXVI (April 1958); reprinted in Robert W. Fogel and Stanley L. Engerman (eds.), *The Reinterpretation of American Economic History* (New York: Harper & Row, 1971), ch. 25.

prostitution. Somehow, passing a law makes the prohibited market more profitable, and therefore the law leads to greater output of the prohibited substances or services. This is a very odd argument when it comes from people who defend the efficiency and productivity of laissez-faire economics.

A fundamental principle of economics is this: the division of labor is limited by the extent of the market. This was articulated by Adam Smith in Chapter 3 of *Wealth of Nations* (1776). Another basic principle is this one: the greater the division of labor, the greater the output per unit of resource input—in short, the greater the efficiency of the market. When the market increases in size, it makes possible an increase in cost-effective production. Advertising and mass-production techniques lower the cost of production and therefore increase the total quantity of goods and services demanded. This is well understood by economists.

Nevertheless, there are some people who still believe that laws against so-called "victimless crimes"—sins that they do not regard as major transgressions, I suspect—actually increase the profitability of crime. On the contrary, such laws increase the risk of the prohibited activities, both to sellers and consumers. Prices rise; the market shrinks; per unit costs rise; efficiency drops. Such laws create monopoly returns for a few criminals. But the critics of such laws conveniently forget that *monopoly returns are always the product of reduced output*. This, in fact, is the conventional definition of a monopoly. Thus, civil laws do reduce the extent of the specified criminal behavior.[39] They confine such behavior to certain criminal subclasses within the society. Biblically speaking, such laws place *boundaries* around such behavior.

There is no doubt that nineteenth-century laws against the slave trade drastically reduced the profitability of the international slave trade. These laws increased the risks for slavers, reduced their profits, and narrowed their markets. The result was a drop in output (slavery) per unit of resource input.

3. Household Evangelism

Apart from the one exception provided by the jubilee law, the Old Testament recognized the legitimacy of involuntary slavery of for-

39. Cf. James M. Buchanan, "A Defense of Organized Crime?" in Ralph Andreano and John J. Siegfried (eds.), *The Economics of Crime* (New York: Wiley, 1980), pp. 395–409.

eigners only when the slaves were female captives taken after a battle (Deut. 20:10–11, 14).[40] To fight a war for the *purpose* of taking slaves would have been illegitimate, for this was (and is) the foreign policy of empires. It is true that the jubilee law did allow both the importation of pagan slaves and the purchase of children from resident aliens (Lev. 25:44–46),[41] but the purpose of this practice was primarily covenantal: bringing slaves of demon-possessed cultures into servitude under Hebrew families that were in turn under God.

Once the New Testament gospel became an international phenomenon that spread outward from local churches rather than from a central sanctuary in Jerusalem, there was no longer any need to bring potential converts into the land through purchase. Jesus completely fulfilled the terms of the jubilee law, including the kingdom-oriented goals of the imported slave law (Luke 4:16–18).[42] He transferred the kingdom from the land of Israel to the church international: "Therefore say I unto you, The kingdom of God shall be taken from you, and given to a nation bringing forth the fruits thereof" (Matt. 21:43).[43] He abolished the jubilee's land tenure laws, as well as the slave-holding laws associated with the land of Israel as the exclusive place of temple sacrifice and worship.

4. Adoption

Nevertheless, in principle there remains a modern Christian practice that resembles the Old Testament jubilee slave law. This is the practice of adoption. Christians pay lawyers to arrange for the adoption of infants whose pagan parents do not want them. This is true household adoption rather than permanent slavery, but biblical law requires children to support parents in their old age, so the arrangement is not purely altruistic. The practice of adoption is governed by civil law in order to reduce the creation of a market for profit,[44] there-

40. Gary North, *Inheritance and Dominion: An Economic Commentary on Deuteronomy*, 2nd ed. (Dallas, Georgia: Point Five Press, [1999] 2012), ch. 48.

41. Gary North, *Boundaries and Dominion: An Economic Commentary on Leviticus*, 2nd ed. (Dallas, Georgia: Point Five Press, [1994] 2012), ch. 30.

42. North, *Treasure and Dominion*, ch. 4.

43. Gary North, *Healer of the Nations: Biblical Blueprints for International Relations* (Ft. Worth, Texas: Dominion Press, 1987), Introduction.

44. Actually, the adoption laws have created a profitable market for babies, but only state-licensed lawyers and adoption agencies are legally allowed to reap these profits. This is a legitimate licensing arrangement, similar in intent and economic effect as the licensing of physicians: to control a potentially coercive market phenomenon. Physicians control access to addictive drugs, and lawyers and adoption agencies control access to babies offered for adoption. This reduces the threat of kidnapped babies. By

fore discouraging the kidnapping of infants, but the economics of modern adoption are similar to the Old Testament practice of buying children from resident aliens. Adoption is a very good practice. Children are bought out of slavery inside covenant-breaking households.

Rushdoony referred to kidnapping as "stealing freedom."[45] He commented:

> The purpose of man's existence is that man should exercise dominion over the earth in terms of God's calling. This duty involves the restoration of a broken order by means of restitution. To kidnap a man and enslave him is to rob him of his freedom. A believer is not to be a slave (I Cor. 7:23; Gal. 5:1). Some men are slaves by nature; slavery was voluntary, and a dissatisfied slave could leave, and he could not be compelled to return, and other men were forbidden to deliver him to his master (Deut. 23:15, 16).... The purpose of freedom is that man exercise dominion and subdue the earth under God. A man who abuses this freedom to steal[46] can be sold into slavery in order to work out his restitution (Ex. 22:3); if he cannot use his freedom for its true purpose, godly dominion, reconstruction, and restoration, he must then work towards restitution in his bondage.[47]

Conclusion

Kidnapping is a crime against God, man, and the social order. It steals men's freedom. It asserts the autonomy of the kidnapper over the victim. It substitutes the kidnapper's profit for the calling God gives to each man. It attacks God through His image, man. The kidnapper is therefore subject to the death penalty, at the discretion of his victim.

The potential imposition of the death penalty produces unequal risks for different economic classes. The rich are more likely to be victims in a non-slave society, where the quest for a ransom payment is the primary motivation for the kidnapper. *Equality before the law* is the fundamental principle of biblical law enforcement; *inequality of economic results* is therefore inescapable. By imposing a single penalty, death, the law increases the percentage of rich kidnap victims.

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centralizing access to the flow of babies offered for adoption, the civil government can more successfully impose restrictions on the market for babies by guaranteeing that parents make the decision to supply this market, not kidnappers.

45. R. J. Rushdoony, *The Institutes of Biblical Law* (Nutley, New Jersey: Craig Press, 1973), p. 484.

46. Rushdoony obviously did not mean "freedom to steal"; he means a person who "abuses his freedom by stealing," or "in order to steal." The use of the infinitive, "to steal," could lead to confusion.

47. *Ibid.*, p. 485.

The legislated abolition of slavery reduces the market demand for stolen men, thereby reducing the profit accruing to kidnappers, and increasing the safety from kidnapping for the average citizen. To be effective, however, the majority of potential slave-owners must agree with the abolition, or else be fearful of violating the law. A profit-seeking black market in slaves would partially offset the economic effects of this law, namely, reduced demand for slaves. The high penalty imposed on both kidnapper and buyer, if coupled with the moral education of potential buyers of slaves (the final users), reduces the size and therefore the efficiency of the slave market. (Remember Adam Smith's observation: the division of labor is limited by the extent of the market.)[48]

Finally, the death penalty overcomes the short-run, present-oriented time perspective of the potential kidnappers. The magnitude of the punishment calls attention to the magnitude of the crime. A death penalty forces the criminal to contemplate the possible results of his actions.

Rushdoony did not consider the concept of victim's rights in his *Institutes of Biblical Law*. He wrote that "the death penalty is mandatory for kidnapping. No discretion is allowed the court. To rob a man of his freedom requires death."[49] I would agree with this statement if it were qualified as follows: "The death penalty is mandatory for kidnapping. No discretion is allowed the court, once the victim has specified the death of the kidnapper as his preferred penalty." To deny the victim the legal right to specify the appropriate sanction is to deny the concept of victim's rights.

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48. Smith, *The Wealth of Nations* (1776), ch. 3.
49. Rushdoony, *Institutes*, p. 486.

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THE COSTS OF PRIVATE CONFLICT

And if men strive together, and one smite another with a stone, or with his fist, and he die not, but keepeth his bed: If he rise again, and walk abroad upon his staff, then shall he that smote him be quit: only he shall pay for the loss of his time, and shall cause him to be thoroughly healed.

EXODUS 21:18–19

The theocentric principle here is that man is God's image, and that for anyone to strike another person unlawfully or autonomously is an attempt to commit violence against God. It is man as God's representative that places him under the covenantal protection of civil government. The state is required by God to protect men from the physical violence of other men.

A. Reducing Conflict

One of the primary earthly goals of any godly society is the elimination of conflict among its citizens. The establishment of a reign of peace is one of the most prominent promises in the Old Testament's prophetic messages. Peace is therefore a sign of God's blessing and also a means of attaining other blessings, such as economic growth. Men who strive together in private battle testify to their own lack of self-discipline, and a godly legal order must provide sanctions against such disturbances of public order.

The Bible reminds men that they are responsible before God and society for their private actions. Specific costs are imposed by biblical law on the victor in any physical conflict. The eventual loser is to be protected and so is his family, whose rights he cannot waive simply by stepping into the arena. The loser is to be compensated for his loss of

time while in bed and also for his medical expenses. In short, the victor must make *restitution* to the loser. The mere possession of superior strength or combat skills is not to be an advantage in the resolution of personal disputes.

We see a similar perspective in the Hittite laws: "If anyone batters a man so that he falls ill, he shall take care of him. He shall give a man in his stead who can look after his house until he recovers. When he recovers, he shall give him 6 shekels of silver, and he shall also pay the physician's fee. If anyone breaks a free man's hand or foot, he shall give him 20 shekels of silver and pledge his estate as security. If anyone breaks the hand or foot of a male or a female slave, he shall give 10 shekels of silver and pledge his estate as security."[1] Men must pay the costs of restoring the injured party to physical wholeness.

B. Winners and Losers

These economic restraints on victors remind men of the costs of injuring others. There are economic costs borne by the physical confrontation's loser. There are also costs borne by society at large. A man in a sickbed can no longer exercise either his calling or his job. He cannot labor efficiently, and the products of his labor are not brought to the marketplace. If he is employed by another person, the employer's operation is disrupted. By forcing the physical victor to pay for both the medical costs and the alternative costs (forfeited productivity on the part of the loser), biblical law helps to reduce conflict. The physical victor becomes an economic loser. The law also insures society against having to bear the medical costs involved. The immediate family, charitable institutions, or publicly financed medical facilities do not bear the costs.

The Mishnah, which was the legal code for Judaism until the late nineteenth century, establishes five different types of compensation. First, compensation for the injury itself, meaning damages for a permanent injury that results from the occurrence. Second, compensation for the injured person's pain and suffering. Third, compensation for the injured person's medical expenses. Fourth, compensation for the injured person's loss of earnings (time). Fifth, compensation for

1. "The Hittite Laws," paragraphs 10–12, in *Ancient Near Eastern Texts Relating to the Old Testament*, ed. James B. Pritchard, 3rd ed. (Princeton, New Jersey: Princeton University Press, 1969), p. 189. Paragraphs 13–16 continue the restitution theme: monetary penalties for biting off noses and ears of free men or slaves.

the embarrassment or indignity suffered by the victim.[2] Not all five will be found in each case, of course.[3]

The judicially significant point is that *the person who wins the conflict physically becomes the loser economically*. The one who is still walking around after the fight must finance the physical recovery of the one who is in bed. The focus of judicial concern is on the victim who suffers the greatest physical injury. Biblical law and Jewish law impose economic penalties on the injury-inflicting victors of such private conflicts. As Maimonides put it, "The Sages have penalized strong-armed fools by ruling that the injured person should be held trustworthy. . . ."[4]

C. Games of Bloodshed

The murderous "games" of ancient Rome, where gladiators slew each other in front of cheering crowds, violated biblical law. The same is true of "sports" such as boxing, where inflicting injury is basic to victory. The lure of bloody games is decidedly pagan. Augustine, in his *Confessions*, spoke of a former student of his, Alypius. The young man had been deeply fond of the Circensian games of Carthage. Augustine had persuaded him of their evil, and the young man stopped attending. Later on, however, in Rome, Alypius met some fellow students who dragged him in a friendly way to the Roman amphitheater on the day of the bloody games. He swore to himself that he would not even look, but he did, briefly, and was trapped. "As he saw that blood, he drank in savageness at the same time. He did not turn away, but fixed his sight on it, and drank in madness without knowing it. He took delight in that evil struggle, and he became drunk on blood and pleasure. He was no longer the man who entered there, but only one of the crowd that he had joined, and a true comrade of those who

2. *Baba Kamma* 8:1, *The Mishnah*, ed. Herbert Danby (New York: Oxford University Press, [1933] 1987), p. 342.

3. Emanuel B. Quint, *Jewish Jurisprudence: Its Sources and Modern Applications*, 2 vols. (New York: Harwood Academic Publishers, 1980), I, p. 126. Maimonides wrote: "If one wounds another, he must pay compensation to him for five effects of the injury, namely, damages, pain, medical treatment, enforced idleness, and humiliation. These five effects are all payable from the injurer's best property, as is the law for all who do wrongful damage." Moses Maimonides, *The Book of Torts*, vol. 11 of *The Code of Maimonides*, 14 vols. (New Haven, Connecticut: Yale University Press, 1954), "Laws Concerning Wounding and Damaging," IV:I:1, p. 160. Maimonides made one strange exception: if a person deliberately frightens someone, but does not touch him, he bears no legal liability, only moral liability. Even if he shouts in a person's ear and deafens him, there is no legal liability. Only if he touches the person is there legal liability: *ibid.*, IV:II:7, pp. 165–66.

4. Maimonides, *Torts*, IV:V:4, p. 177.

brought him there. What more shall I say? He looked, he shouted, he took fire, he bore away with himself a madness that should arouse him to return, not only with those who had drawn him there, but even before them, and dragging others along as well."[5] Only later was his faith in Christ able to break his addiction to the games.

In the city of Trier (Treves) in what is today Germany, alien hordes burned the town in the early fifth century, murdering people and leaving their bodies in piles. Salvian (the Presbyter) recorded what took place immediately thereafter: "A few nobles who survived destruction demanded circuses from the emperors as the greatest relief for the destroyed city."[6] They wanted the immediate reconstruction of the arena, not the town's walls, so powerful was the hold of the bloody games on the minds of Roman citizens.

D. Chaos Festivals

Roger Caillois, in his book, *Man and the Sacred* (1959), argued that the chaos festivals of the ancient and primitive worlds served as outlets for hostilities. These festivals are unfamiliar to most modern citizens, or in the case of the familiar ones, such as Mardi Gras in New Orleans, carnival in the Caribbean, or New Year's Eve parties in many nations, they are not recognized for what they are. He wrote:

> It is a time of excess. Reserves accumulated over the course of several years are squandered. The holiest laws are violated, those that seem at the very basis of social life. Yesterday's crime is now prescribed, and in place of customary rules, new taboos and disciplines are established, the purpose of which is not to avoid or soothe intense emotions, but rather to excite and bring them to climax. Movement increases, and the participants become intoxicated. Civil or administrative authorities see their powers temporarily diminish or disappear. This is not so much to the advantage of the regular sacerdotal caste as to the gain of secret confraternities or representatives of the other world, masked actors personifying the Gods or the dead. This fervor is also the time for sacrifices, even the time for the sacred, a time outside of time that recreates, purifies, and rejuvenates society. . . . All excesses are permitted, for society expects to be regenerated as a result of excesses, waste, orgies, and violence.[7]

5. *The Confessions of St. Augustine*, trans. John K. Ryan (Garden City, New York: Image Books, 1960), Book 6, ch. 8.

6. Salvian, *The Governance of God*, in *The Writings of Salvian, the Presbyter*, Jeremiah F. O'sullivan, trans. (New York: Cima Publishing Co., 1947), Bk. VI, Sect. 15, p. 178. Salvian was a contemporary of St. Augustine, in the fifth century. This was probably written around A.D. 440.

7. Roger Caillois, *Man and the Sacred* (Glencoe, Illinois: The Free Press, 1959), p. 164.

It was these festivals, he argued, that in some way drained off the violent emotions inherent in men. (On the contrary, such festivals stimulated violent emotions.)[8] The festivals, he argues, were therefore basic to the preservation of social peace. Without these ritual celebrations of lawlessness, he argued, there will be an increase of actual wars. In other words, men innately require the tension and release of violence. Prohibit the socially circumscribed ritual chaos of Mardi Gras, carnival, and New Year, and we therefore supposedly risk the outbreak of war. Because modern man has suppressed such ritual chaos, he concluded, we have seen the increase of wars and their intensity and devastation.[9]

In contrast to Caillois's analysis stands the Bible. Leaders in a godly social order should strive to eliminate such chaos festivals and "circumscribed violence." The laws requiring restitution for anyone injured in a brawl are related to the general prohibition against individual violence. Lawlessness is to be suppressed. Man is not told to give vent to his feelings of violence; he is told to overcome them through self-discipline under God. Wars and violence come from the lusts of men (James 4:1). These bloody lusts are to be overcome, not ritually sanctioned. The celebration of communion is God's sanctioned bloody ritual which gives men symbolic blood, but the Bible forbids the drinking of actual blood (Lev. 3:17; Deut. 12:16, 23; Acts 15:20).

E. Biblical Law Confronts the "Honorable Duel"

The Bible informs us that the civil government is to protect human life. Each man is made in God's image, and men, acting as private citizens, do not have the right to attempt to attack God indirectly by attacking His image in other men. Men are not sovereign over their own lives or over the lives of others; God is (Rev. 1:18). God delegates the right of execution to the civil government, not to individual men acting outside a lawful institution in the pursuit of lawful objectives.

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8. It is interesting to note that modern political liberals criticize graphic violence on television because it may produce violent behavior, especially in children. In contrast, they argue that graphic sex in magazines, books, and moving pictures is harmless, and in no way can be shown to produce deviant sexual behavior. In other words, liberals are opposed to violence and favor open sex. Conservatives have a tendency to reverse these two preferences and argue the opposite positions.

9. *Ibid.*, ch. 4.

1. The Duel

The private duel is just such a threat to human life and safety. Fighting is a threat to social peace. It is disorderly, willful, vengeful, and hypothetically autonomous. It poses a threat to innocent bystanders (Ex. 21:22–25).[10] It can destroy property. When a death or serious injury is involved, a duel can lead in some societies—especially those that place family status above civil law—to an escalation of inter-family feuding and blood vengeance.

The premise of the duel or the brawl is the assertion of the existence of *zones of judicial irresponsibility*. Men set aside for themselves a kind of arena in which the laws of civil society should not prevail. There may or may not be rules governing the private battlefield, but these rules are supposedly special, removing men from the jurisdiction of civil law. The protection of life and limb, which is basic to the civil law, is supposedly suspended by mutual consent. "Common" laws supposedly have no force over "uncommon" men during the period of the duel. Somehow, the law of God does not apply to private warriors who defend their own honor and seek to impose a mutually agreed-upon form of punishment on their rivals.

But the laws of God *do* apply. James Jordan wrote: "The Bible does not permit the use of force to resolve disputes, except where force is lawfully exercised by God's ordained officer, the civil magistrate. To put it another way, the Bible requires men to submit to arbitration, and categorically prohibits them from taking their own personal vengeance (Rom. 12:17–13:7)."[11]

An obvious implication of the biblical law against dueling is the prohibition of gladiatorial contests, which would include boxing. A boxer who kills another man in the ring should be executed. Another implication is the necessity of rejecting the notion of a "fair fight." There is no such thing as a fair fight. Flight is almost always preferable to private fighting, but where fighting is unavoidable, it should be an all-out confrontation. Should a person "fight fair" when his wife is attacked? Should women under attack from a man "fight fairly"? The answer ought to be clear.[12] Thus, the code of the duel is doubly perverse: first, it imputes cowardice to a man who would seek to keep the peace by walking away from a challenge to his honor; second, it

10. Chapter 36.

11. James B. Jordan, *The Law of the Covenant: An Exposition of Exodus 21–23* (Tyler, Texas: Institute for Christian Economics, 1984), p. 110.

12. *Ibid*., p. 112.

restricts a man's lawful self-defense to a set of agreed-upon "rules of the game." Fighting is not a game; it is either an evil assertion of personal autonomy or else a necessary defense of life, limb, and perhaps property.

2. Duel to the Death: Murder

One implication of Exodus 21:18–19 is that a death resulting from a duel or a brawl is to be regarded as murder.[13] This is a concept of personal responsibility that is foreign to societies that allow private violence. In such societies, the quest for personal power and prestige overrides the quest for public peace. *The autonomy of man is affirmed by the ritual practices of the duel and brawl.* Wyatt-Brown wrote of the antebellum (pre-1861) American South: "Ordinarily, honor under the dueling test called for public recognition of a man's claim to power, whatever social level he or his immediate circle of friends might belong to. A street fight could and often did accomplish the same thing for the victor. Murder, or at least manslaughter, inspired the same public approval in some instances. Just as lesser folk spoke ungrammatically, so too they fought ungrammatically, but their actions were expressions of the same desire for prestige."[14]

Under biblical law, injured bystanders are protected from deliberate violence on the part of other people on an "eye for eye" basis.[15]

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13. Robert L. Dabney, *Lectures in Systematic Theology* (Grand Rapids, Michigan: Zondervan, [1878] 1972), pp. 404–6. Dabney was by far the most insightful Presbyterian theologian in the nineteenth-century South. He had served for several months, before becoming too ill to continue, as Gen. Thomas "Stonewall" Jackson's chaplain, as well as his Chief of Staff. He later wrote a biography of Jackson, so he cannot be considered a man hostile to military virtues. Cf. Thomas Cary Johnson, *The Life and Letters of Robert Lewis Dabney* (Richmond, Virginia: Presbyterian Committee of Publication, 1903), ch. 13.

14. Bertram Wyatt-Brown, *Southern Honor: Ethics and Behavior in the Old South* (New York: Oxford University Press, 1982), p. 353.

15. A somewhat different problem is raised if a person defends himself from another person who has initiated violence. What if, in defending himself, a person injures a bystander? Clearly, it was not the bystander's fault. The person responsible for inflicting the injury should pay damages. Should it be the person who initiated the violence or the defender who inadvertently harmed the bystander? For example, what if a man attacks another man, and the second person pulls out a gun and fires at the attacker, hitting a bystander by mistake? A humanistic theory of strict liability would produce a judgment against the defender, for his defense was misguided, or excessive, or ineffective. But what if the attacker had grabbed the defender's "shooting hand," causing him to fire wildly? The injury to the bystander would seem to be the fault of the attacker. However, if the original attacker was using only his fists, and the defender had pulled out a gun and started shooting—a seemingly excessive response—would this make the original attacker a defender when he attempted to grab the weapon? Judgment is complicated,

An injured loser who walks again is entitled to full compensation. But in the case where the loser dies, the judges are required to impose a capital sentence on a surviving fighter. When the loser cannot "walk abroad," the victor must not be "quit." At best, he would have to pay an enormous fine to the family of the dead man, but even this would seem to be too lenient, because the only instance of a substitution of payment for the death sentence involves criminal negligence, but not willful violence: the owner's failure to contain a dangerous beast that subsequently kills a man (Ex. 21:29–30). The autonomous shedding of man's blood, even to "defend one's good name," is still murder.

It is clear that if a biblically honorable man refuses to fight because the civil law supports his position by threatening him with death should he successfully kill his opponent, he can avoid the fight in the name of personal self-confidence. He says, in effect, "I know I can probably kill you; therefore, I choose not to enter this fight because I will surely be executed after I kill you." Thus, he can avoid being regarded as a coward. This breaks the central social hold that the *code duello* has always possessed: the honorable man's fear of being labeled a coward. But in order to deflect this powerful hold, the state must be willing to enforce the death penalty on victors.

F. Courts and Vigilantes

Legal predictability is crucial to the preservation of an orderly society. The breakdown of predictable justice in any era can lead to a revival of blood vengeance. Those who are convinced that the court system is unable to dispense justice and defend the innocent are tempted to "take the law into their own hands." The rise of vigilante groups that take over the administration of physical sanctions always comes at the expense of legal predictability. This is a sign of the breakdown in the legal order, and it is accompanied by a loss of legitimacy by "establishment" judicial institutions.[16] Eventually, vigilante movements are

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for life is complicated. The Bible places restraints on violence. The goal of the God-fearing man should be to reduce private physical violence. Thus, if the attacker uses fists, and the defender has a weapon, the attacker should be warned to stop. The victim does have the right to identify the attacker and press charges. The civil government should inflict the penalty. But if the attacker still challenges the person with the weapon, then the person has the right to stop the attacker from inflicting violence on him.

16. This appears to be beginning in large cities in the United States. Citizen's patrols became common in certain Jewish districts in the New York City area in the late 1960s. A parallel group of inner-city youths sprang up in the late 1970s, the Guardian Angels, initially composed mostly of Puerto Ricans. This group has spread across the United States. By 1988, its leaders claimed 60 chapters and 6,000 members. Citizen's patrols

either stamped out by the existing social order or else they become the foundation of a new social order: the warlord society.

The various vigilante movements of the United States in the nineteenth century arose when the civil authorities would not or could not enforce the law.[17] Vigilantes were common in the American West after the Civil War prior to the establishment of local and regional judicial order. The most famous vigilante group in United States history is the Ku Klux Klan. The original Ku Klux Klan of the American South, 1865–71, was a defensive movement.[18] The organization was self-consciously occult in its regalia. Members wore white sheets with holes cut out for eyes, so that they would resemble the folklore version of ghosts, thereby adding to the terror of superstitious former slaves. The Klan was highly liturgical, its rituals filled with diabolic symbols, hidden signs, and other elements of secret societies, and it predictably degenerated into violence and lawlessness within a few years. It was officially disbanded in 1869, and when local "dens" persisted, it was stamped out by the U.S. military. An imitation of the old Klan rose again to national political prominence in the 1920s,[19] only to fade nationally in the 1930s and in the South in the 1940s.

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have now spread to black neighborhoods and middle class neighborhoods, especially in response to the advent of "crack" houses: the modern equivalent of the opium dens of the nineteenth century. In some cases, local police departments do cooperate with these citizen's patrols, and to this extent they are not pure vigilante organizations. See "Neighbors Join to Rout the Criminals in the Streets," *Insight* (Nov. 28, 1988), pp. 8–21.

17. Richard Maxwell Brown, "The History of Vigilantism in America," in H. Jon Rosenbaum and Peter C. Sederberg (eds.), *Vigilante Politics* (Philadelphia: University of Pennsylvania Press, 1976); see also Brown, *Strain of Violence: Historical Studies of American Violence and Vigilantism* (New York: Oxford University Press, 1975).

18. The early twentieth-century trilogy of novels by Thomas Dixon eulogized this early Klan. *Birth of a Nation*, the epic D. W. Griffith silent film of 1915, was based on Dixon's second novel in this trilogy, *The Clansman* (1905). This moving picture was the first modern "spectacular," and was shown to large audiences across the United States. It had the support of President Woodrow Wilson (a college classmate of Dixon's) and the Chief Justice of the U.S. Supreme Court, a former Klansman. See David M. Chalmers, *Hooded Americanism: The First Century of the Ku Klux Klan, 1865–1965* (Garden City, New York: Doubleday, 1965), pp. 26–27. The film, unfortunately, led to a revival of the Klan: *ibid.*, ch. 4. (The 17-year-old star of Griffith's movie, Lillian Gish, also starred in *The Whales of August* in 1987—a long career.)

19. It was the victory of an anti-Klan candidate for governor in the Republican Party's primary in the state of Oregon which led the Klan to jump to the Democratic Party. They elected the Democratic candidate, plus enough members of the legislature to pass a law mandating that all children between the ages of eight and sixteen attend a government-operated school. Chalmers, *Hooded Americanism*, p. 3. This law was overturned by the U.S. Supreme Court in 1925 in a landmark case, *Pierce v. Society of Sisters*, which has remained the key Court decision in the fight for Christian schools.

Today, numerous local Klan-type groups exist, but they have little influence.[20] But the Klan's former power testifies to the fact that when civil courts fail to dispense justice and therefore lose their legitimacy in the eyes of large numbers of citizens, societies will eventually see the rise of private dispensers of "people's justice."

Without a sense of legitimacy, the authority of public courts is threatened. The courts need legitimacy in order to gain the long-term voluntary cooperation of the public, meaning self-government under law, without which law enforcement becomes both sporadic and tyrannical. No legal system can afford the economic resources that would be necessary to gain full compliance to an alien law-order in a society whose members are unwilling to govern themselves voluntarily in terms of that law-order.[21] If the courts do not receive assent from the public as legitimate institutions, they can maintain the peace only by imposing sentences whose severity goes beyond people's sense of justice, which again calls into doubt both legitimacy and legal predictability.

G. Judicial Pluralism and Social Disintegration

A civil government that refuses to defend a law-order that is seen as legitimate by the public is inviting the revival of the duel, the feud, and blood vengeance. If the public cannot agree on standards of decency, then the courts will be tempted to become autonomous. Widespread and deep differences concerning religion lead to equally strong disagreements over morality and law. Religious pluralism leads to moral and judicial pluralism, meaning unpredictable courts. *Religious pluralism is an outgrowth of polytheism.* Polytheism inescapably leads to what we might call "polylegalism." Too many law courts decide in terms of conflicting moralities. Only the strong hand of centralized and bureaucratic civil government can enforce a single standard of law on a religiously divided public, which is why religious and judicial pluralism ultimately leads to tyranny: the grab for power. Long-term judicial pluralism is a myth: one group or another ultimately must decide what is right and what is wrong, what should be prohibited by civil law and what shouldn't.[22]

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20. As one southerner described the Klan: "It is made up mainly of gasoline station attendants and FBI informers. The members can easily spot the informers: they are the only ones who pay their monthly dues."

21. Chapter 19:D.

22. Gary North, *Political Polytheism: The Myth of Pluralism* (Tyler, Texas: Institute for Christian Economics, 1989).

The myth of judicial pluralism has hidden from the people (including Christians) the reality of the inescapable *intolerance* of all civil government. There can no more be permanent religious neutrality on earth than in heaven, and as time moves toward that final court decision, the impossibility of pluralism is becoming more obvious. Either God or Satan will execute final judgment; either God's law or man's law will be imposed on eternity. The covenantal representatives of each kingdom will, on earth and in history, progressively present their respective supernatural sovereign's case to the world. There is no way to reconcile these competing claims. Marxism cannot be reconciled with Christianity, and neither system can be reconciled with Islam. The liberal humanist's hope in treaties, arms control, and endless tax-supported economic deals with Communist nations, 1917–1991, was as doomed to failure as the conservative humanist's faith in the peace-promoting reign of neutral natural law.[23] Elijah's challenge is inescapable: "How long halt ye between two opinions? If the LORD be God, follow him: but if Baal, then follow him." Then as now, the people delay making a decision: "And the people answered him not a word" (I Kings 18:21).

They did not remain silent forever. The fire came from heaven and consumed the sacrifice on God's altar. The people saw, understood, and acted: they brought the 850 priests of Baal to Elijah, who killed them (I Kings 18:40). The nation for the moment sided with God's prophet. The "priests of Baal" of any era can delay judgment for a while, but eventually *judgment comes in history*. Nevertheless, without a change in heart, the people eventually return to their old ways. The Revolution consumes its own children. The prophet is again put on the run (I Kings 19).

The humanist courts of our day appeal to religious pluralism, yet they are creating judicial tyranny.[24] The anti-feud, anti-clan,[25] anti-

23. Gary North, *Healer of the Nations: Biblical Blueprints for International Relations* (Ft. Worth, Texas: Dominion Press, 1987), ch. 3.

24. Carrol D. Kilgore, *Judicial Tyranny* (Nashville, Tennessee: Nelson, 1977).

25. Weber wrote: "When Christianity became the religion of these peoples who had been so profoundly shaken in all their traditions, it finally destroyed whatever religious significance these clan ties retained; perhaps, indeed, it was precisely the weakness or absence of such magical and taboo barriers which made the conversion possible. The often very significant role played by the parish community in the administrative organization of medieval cities is only one of the many symptoms pointing to this quality of the Christian religion which, in dissolving clan ties, importantly shaped the medieval city." He contrasted this anti-clan perspective with that of Islam. Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, eds. Guenther Roth and Claus Wittich (New York: Bedminster Press, [1924] 1968), p. 1244.

duel ethic of once-Christian Western bourgeois cultures—societies in which social peace has fostered economic growth—is being undermined by judges who are creating lawlessness in the name of a purified humanist legal system. Judicial pluralism must be replaced, but not from the top down, and not from the vigilante's noose outward. The satanic myth of legal pluralism must be replaced by the power of the Holy Spirit in the hearts of men. The Holy Spirit is the enforcer in New Testament times.

Conclusion

Social order requires a degree of social peace. When biblical law began to influence the civil governments of the West, an increase of social peace and social order took place. This, in turn, led to greater economic growth and technological development.[26]

Christian culture is orderly. The Christian West steadily abolished or redirected the chaos festivals of the pagan world, until the growth of humanism-paganism began to reverse this process.[27] Legal systems became predictable, as the "eye for eye" principle spread alongside the gospel of salvation. The unpredictable violence of state power was thereby reduced. In private relationships, men were not allowed to vent their wrath on each other in acts of violence. Those who violated this law became economically liable for their actions.

The duel or brawl is by nature a direct challenge to the authority and legitimacy of the civil government. It transfers to individuals operating outside the state—the God-ordained monopoly of violence—a degree of legal immunity from civil judgment. It transfers sovereignty in the administration of violence from the state to the individual. It is not surprising, therefore, that one program of legal reform recommended by some contemporary libertarian anarchists is the legalization of dueling. The duel is seen as a private act between consenting adults and therefore sacrosanct. (Sacrosanct: from *sacro* = sacred rite, and *sanctum* = holy and inviolable. Also related to *sanction* = legal and sovereign authority, or a judgment by a legal and sovereign authority.)

The abolition of the private duel in the late nineteenth century was a case in point. While this development came during an era of increasing secularism, it was consistent with a Christian view of civil

26. Part 2, *Decalogue and Dominion*, Conclusion, D.

27. Peter Gay aptly titled the first volume of his study of the Enlightenment, *The Rise of Modern Paganism* (New York: Knopf, 1966). The two-volume study is titled, *The Enlightenment: An Interpretation* (New York: Knopf, 1966, 1969).

law. Personal self-control within a social framework of predictable biblical law is to replace physical violence. The failure of Christian culture in the antebellum South to eliminate the imported feudal tradition of duelling in the name of gentlemanly honor eventually was rectified. The Southern duel disappeared with Gen. Lee's surrender to Gen. Grant at the Appomattox Court House in 1865.

Yet even in the South, there were strict limits placed on this code duello. It had been a highly ritualized procedure, as the duelling handbook of the era indicated, a book written by a Governor of South Carolina, John Lyde Wilson's *Code of Honor* (1838). It is significant that custom recognized the immunity of serious Christians to the formal ritual of the honorable duel. Wyatt-Brown comments: "Of course, among Christians and older men who were not expected to show youthful passions excessive violence was considered inappropriate. As Henry Foote noted, devout churchmen could forgo duels or, in fact, any other form of physical redress without incurring public censure. For other men a different standard prevailed."[28] Bruce, also citing Foote's statement, concurred: "Only a known Christian, appealing to religious scruples, could refuse to challenge another gentlemen with public approval. . . ."[29] It was only the defeat of the South on the battlefield that finally transformed the model of a Southern gentlemen from a man ready to defend his honor with personal violence into a self-disciplined, soft-spoken person who gains his revenge for an insult to his honor in non-violent ways. A similar transformation of Japanese aristocratic ideals, also closely tied to feudal and military concepts of honor, took place after Japan's defeat in World War II. A military defeat is an expensive way for a society to learn to conform its social standards to the requirements of biblical law.

28. Wyatt-Brown, *Southern Honor*, p. 354.
29. Bruce, *Violence and Culture*, p. 28.

36

THE HUMAN COMMODITY

And if a man smite his servant, or his maid, with a rod, and he die under his hand; he shall be surely punished. Notwithstanding, if he continue a day or two, he shall not be punished:for he is his money.

EXODUS 21:20–21

Exodus 21:20–21 clearly teaches that an owner could legitimately beat his permanent heathen slaves (Lev. 25:44–46) and indentured Hebrew bondservants (Deut. 15:12). The theocentric principle here is that *the slave-owner is God's representative agent to the slave*. God deals with all men hierarchically. This is very clear in the case of master and slave. The slave is in an inferior position institutionally, though not necessarily morally. His servitude may be the result of some flaw in his character or his skills, or it may be because of uncontrollable external circumstances. The case laws do not distinguish between the servant who is a moral failure and the servant who has suffered a temporary but uncontrollable setback. The bondservice laws apply to all bondservants and all masters equally. The bondservant's legal status is judicially binding on the civil magistrates; they are not to make arbitrary exceptions to God's authorized sanctions in terms of their evaluation of the servant's moral condition. In this way, *the state is placed under limits*, which is even more important than placing masters and slaves under limits.[1] Jesus fulfilled the jubilee laws and

1. Critics of competitive free market capitalism sometimes argue that personal wealth can result from "luck" as well as from hard work, from the "accident of birth" as well as from successful entrepreneurship. They want the civil government's bureaucrats to determine whether other men's wealth is morally deserved, and then redistribute wealth by compulsion in terms of the "deserving character" of the recipients. But because civil law must be general in scope, the proponents of compulsory wealth redistribution must then generalize their criticisms of the more economically successful. One

thereby abolished the legal foundation of permanent chattel slavery (Luke 4:16–18);[2] He did not abolish the state. The state is a far more important institution historically and judicially than private chattel slavery ever has been.

A. "He Is His Money"

What did this phrase mean? How was a bondservant the owner's money? The answer should be obvious: he could trade the servant for assets, just as he could trade money for assets. The bondservant was a commodity, just as money in the ancient world was a commodity. He could sell a bondservant for money. There was a market for these slaves.

This equivalency is basic to understanding labor services as commodities. They possess value. They can be sold for services, commodities, or money that can buy services and commodities. Human labor services have characteristic features of services supplied by commodities. In a slave system, the services of a slave can be capitalized. The slave is a capital good, just as a tool is a capital good. A slave can perform services; so can a tool. There are markets for both forms of capitalized services. The same rules of asset evaluation and pricing apply to both forms of capital. It is only because slave markets are illegal and underground today that we are not more familiar with the pricing of slaves.

Does this mean that a human being is a commodity? Is he a capital good? He is, but he is more than this. He is the image of God. But what of human labor services? Are they commodities? Are they priced in the same way that commodities are priced? Yes. In one of

legislative result is the graduated ("progressive") income tax, which assumes that all high-income earners have been rewarded disproportionately to their productivity, and all low-income people therefore deserve a share in the high-income people's gains. The economically successful must subsidize the unsuccessful. Thus, there can be no neutrality with respect to the Bible in tax policy. We should affirm the biblical standard, namely, that civil law must not distinguish between the morally deserving or undeserving nature of income recipients, so long as they did not use force or fraud in gaining their wealth. The alternative is to conclude that civil law must assume that either the successful deserve special treatment at the expense of the less successful, or vice versa. The law must "take sides." It must discriminate. This makes the state arbitrary and dangerous. Because the case laws of Exodus do not distinguish between slaves and masters in terms of their comparative moral stature or their prior outward circumstances, there is no way biblically to justify the creation of welfare state wealth-redistribution schemes based on people's comparative moral stature or their prior outward circumstances.

2. Gary North, *Treasure and Dominion: An Economic Commentary on Luke*, 2nd ed. (Dallas, Georgia: Point Five Press, [2000] 2012), ch. 4

the last remaining forms of labor capitilzation, professional athletics, the buyers and sellers of labor services establish prices for long-term packages of these highly specialized labor services. In this case, the seller benefits from this capitalized value. Under the slave systems in history, he did not. But the principles of asset pricing are the same.

Then in what ways were Hebrew owners of slaves to act differently in dealing with them than they did as owners of beasts of burden? More important, what was the judicial basis of these distinctions? When we understand these principles, we can better understand what modern labor relations should be.

There is another consideration. There is nothing in the New Testament to indicate that indentured servitude is no longer legitimate. The buyer of labor services still has the legal right to offer laborers long-term contracts that cannot legally be broken by either party. If this were not true, then Paul's epistle to Philemon is incomprehensible. Paul sent Onesimus back into slavery to Philemon.

B. Sanctions and Moral Reform

The master is supposed to be an agent of moral reform; his training, support, and example are supposed to serve as the bondservant's pathway back to self-government and productivity. The master therefore exercises lawful discipline in God's name, including physical discipline. He brings *covenantal sanctions*. Because the servant is made in God's image, there are limits placed on the master's authority. This authority to impose sanctions is not unlimited; it is restrained by civil law and, as we shall see, by economic self-interest.

So severe is a Bible-sanctioned beating that a servant may even die a few days later. This is regarded as a case of *accidental death*, and the owner is not to be held responsible. It is acknowledged by God that servants can be rebellious to the point that they may be severely beaten. This is the passage that so disturbed Christian family counsellor James Dobson: "Do you agree that if a man beats his slave to death, he is to be considered guilty only if the individual dies instantly? If the slave lives a few days, the owner is considered not guilty (Exodus 21:20–21)[?] Do you believe that we should stone to death rebellious children (Deuteronomy 21:18–21)? Do you really believe we can draw subtle meaning about complex issues from Mosaic law, when even the obvious interpretation makes no sense to us today? We can hardly select what we will and will not apply now. If we accept the verses you cited, we are obligated to deal with every last

jot and tittle."[3] He was correct; we are required to take seriously every last jot and tittle.

All human authority is limited by God's law. Man is not autonomous (*autos* = self; *nomos* = law). There are therefore God-imposed judicial limits on the master's lawful authority to impose physical sanctions. What are these limits? The first limit is mechanical. The bondservant must be punished with a rod, not with a lethal weapon. If the master used a lethal weapon to administer the punishment, such as a rock, and the slave died a few days later, the protection normally afforded to him by this law would become the basis of his conviction for murder.[4]

The second limit is the threat of the execution of the master if a servant dies on the day of the beating. "And he that killeth any man shall surely be put to death" (Lev.24:17). The owner is not exempted from this law. He is in a position of authority, and he must not abuse this position of authority. *He who exercises dominion is always under lawful authority*. Men are not autonomous. It should be noted at this point that this law was unique in the legal collections of the ancient Near East. No other collection even deals with a master who kills a slave.[5]

Obviously, it would be difficult to prove that a master deliberately killed his servant if the servant survived the beating for several days.[6] Biblical civil justice is concerned with criminal intent, but only to the extent that such intent can be deduced from the external events. The state is not allowed to seek to get inside a person's mind. This is why lie detector exams must never be made mandatory, nor regarded as anything more than circumstantial evidence.

The third limit is the loss suffered by the servant. If the owner breaks a servant's tooth or puts out an eye—representative injuries indicating any major permanent disfigurement—the servant goes free (Ex. 21:26–27).[7] Also, if the servant dies a few days later, the owner has just lost a major capital investment. His self-interest instructs him to restrain his wrath.[8] The Bible recognizes this economic self-interest on the part of the owner, when it refers to the servant as "his money"

3. James Dobson, "Dialogue on Abortion," in Dobson and Gary Bergel, *The Decision of Life* (Arcadia, California: Focus on the Family, 1986), p. 14.

4. Walter C. Kaiser, Jr., *Toward Old Testament Ethics* (Grand Rapids, Michigan: Zondervan Academie, 1983), p. 102.

5. Shalom Paul, *Studies in the Book of the Covenant in the Light of Cuneiform and Biblical Law* (Leiden: E. J. Brill, 1970), p. 69.

6. *Idem*.

7. Chapter 39.

8. Kaiser, *Toward Old Testament Ethics*, p. 102.

(Ex. 21:21). A rational, calculating owner is not going to destroy his own asset needlessly. *It is the very fact of the "servant as commodity" that protects him from excessive abuse*. It is his commodity status that enables the civil government to leave him in the hands of his owner. Self-government by the owner is encouraged by economic self-interest.[9]

If the economic self-interest of bondservant-owners is biblically legitimate, and even a factor in the self-restraint of owners, as the Bible says is the case, then this implies that *men can legitimately be regarded by others in terms of the economic value that their services offer those other people*. Bondservants command a price in a market. Thus, they are regarded by purchasers as economic commodities. Workers also command a contract price. Thus, they too are regarded by purchasers as economic commodities. The question then is: To what extent?

C. Marx on Workers as Commodities: A Myth

A familiar criticism of capitalism is that it treats people as if they were commodities rather than human beings. The capitalist order supposedly dehumanizes man by defining him as a thing, a part of the production process, a cog in a great machine. The solution, we are told, is to permit men to organize collectively in labor unions (even Christian labor unions),[10] or to overturn the capitalist order, or to get Christians in labor and management to have prayer meetings together.

You might imagine that such a moralistic argument against capitalism is a variation of Marxism. Such is not the case. Marx's few references to workers as commodities appear only in his youthful and unpublished *Economic and Philosophic Manuscripts of 1844*, which were not translated into English until the mid-1960s, and which had zero

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9. None of this provides any insight into the rule of Maimonides regarding the deliberate injuring of other men's slaves: "One's slave is regarded as his own person, but his animal is regarded as his inanimate property. Thus, if one places a burning coal on the breast of another's slave so that he dies, or if one pushes a slave into the sea or into a fire from which he can escape but he does not escape and dies, the injurer is exempt from paying compensation. If, however, one does the same to another's animal, it is regarded as if he had placed a burning coal on another's clothing and burned it, in which case he is liable for payment. The same rule applies in all similar cases." Moses Maimonides, *The Book of Torts*, vol. 11 of *The Code of Maimonides*, 14 vols. (New Haven, Connecticut: Yale University Press, [1180] 1954), "Laws Concerning Wounding and Damaging," IV:IV:22, p. 176. The reader is left on his own here; the logic of this analysis is beyond me. I cannot fathom what general principle of jurisprudence Maimonides' case law represents.

10. See the essay by Gerald Vandezande, "On Strikes and Strife: A Critique of the Status Quo," in John H. Redekop (ed.), *Labor Problems in a Christian Perspective* (Grand Rapids, Michigan: Eerdmans, 1972).

influence on traditional Marxist thought.[11] Marx was quite matter-of-fact in his published writings concerning human labor as a commodity. In his major theoretical work, *Capital* (1867), Marx argued that the "free laborer," meaning the wage-earner in a capitalist economy, sells his own commodity, labor power, to the capitalist. He "must constantly look upon his labour-power as his own property, his own commodity, and this he can only do by placing it at the disposal of the buyer temporarily, for a definite period of time."[12] Original Marxist theory presumed that if the legally free laborer can legitimately look at his own labor power as a commodity, then so can the capitalist buyer. Marx argued that the terms of sale involve exploitation by the capitalist, but he did not argue that the item sold, human labor, is somehow not a commodity.

Years earlier, Marx had distinguished between slave labor, in which the worker is a commodity, and free labor under capitalism, in which he isn't. He discussed labor power, not the worker as a commodity. "Labour power was not always a *commodity*. Labour was not always wage labour, that is, *free labour*. The *slave* did not sell his labour power to the slave-owner, any more than the ox sells its services to the peasant. The slave, together with his labour power, is sold once and for all to his owner. He is a commodity which can pass from the hand of one owner to that of another. He is *himself* a commodity, but the labour power is not *his* commodity."[13] Popular Marxism may occasionally have used the idea of "proletarian man, the commodity" to gain converts, but traditional Marxism always focused on Marx's exploitation theory, his surplus value theory, and other more arcane topics. Thus, to criticize capitalism because of its alleged result—workers as commodities—is a most un-Marxist line of reasoning. Marx believed that it was feudalism and especially capitalism that destroyed slavery, the system in which workers supposedly did become commodities.

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11. These statements appear in the essay, "Antithesis of Capital and Labor. Landed Property and Capital." Two brief references to workers as commodities from this essay are the only ones listed in *Karl Marx Dictionary*, ed. Morris Stockhammer (New York: Philosophical Library, 1965), p. 268.

12. Karl Marx, *Capital* (New York: Modern Library, [1867] 1906), ch.6, pp.186–87. The Modern Library version is a reprint of the Charles H. Kerr edition.

13. Marx, *Wage Labour and Capital* (1849), in Karl Marx and Frederick Engels, *Selected Works*, 3 vols. (Moscow: Progress Publishers, 1969), I, p. 153.

D. Reductionism and Impersonalism: Costly Errors

We need to ask ourselves this question: *Is everything that commands a price nothing more than a commodity*? The phrase "nothing more than" is crucial. Whenever we encounter it, either explicitly or implicitly, we are encountering a form of *economic reductionism*.

1. Reductionism

In any sort of scientific analysis, there lurks the threat of reductionism. This is especially true in the case of social science. Man and man's personal relationships can be reduced to "merely" economics, or "merely" induced responses to stimuli, or "merely" chemical responses, or even nothing more than a figment of his imagination (solipsism). By reducing our explanation of man and his actions to one seemingly all-encompassing model, we become "monocausational" (single cause) thinkers. Monocausational theories invariably become tautological—a repetition of the same concept using different words—and wind up explaining little, throwing little light on most of man's actions. An otherwise useful explanation of some *aspect* of man or society becomes a misleading concept when we attempt to explain *everything* in terms of it.

Economic analysis can easily be misused. Man's labor is sometimes discussed as *nothing more than* an impersonal commodity on an impersonal market. The producers of human labor then are formally reduced to *nothing more than* suppliers of a useful commodity. Man is treated as if he were *nothing more than* a commodity. But what we find in free market societies is that such attitudes on the part of employers (renters of human labor services) lead to reduced profits. Workers resent being treated as machines or as beasts of burden. They respond to such treatment by reducing their output, sometimes in subtle ways that cannot be easily monitored by their supervisors. Thus, on a free market, economic reductionism is self-penalizing for employers. Those who treat workers better, acknowledging the cosmic personalism of all existence, are more likely to bring forth positive, productive efforts from those who are employed by them. The false assumption of impersonalism therefore pays a price. Those who indulge themselves in the fantasy of economic reductionism and impersonalism pay for the privilege.[14] Reductionism is not a zero-price intellectual resource.

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14. A good book on the positive effects of managers treating workers as human beings is R. C. Sproul's *Stronger than Steel: The Wayne Alderson Story* (New York: Harper & Row, 1980). Alderson took a faltering steel fabrication company that was 24 hours

2. The Commodity Factor

At the same time, those who categorically assail the idea that the laborer is *in part* a commodity, or that man's labor power is *in part* a commodity, have abandoned both the Bible and economic analysis. Obviously, if a man can exchange his labor services for scarce economic resources, then the person who purchases his labor services must regard these labor services as scarce economic resources. In short, *the buyer regards labor services as commodities*. Why else would the buyer (employer) give up scarce economic resources (wages) in order to obtain labor services?

Let us take the next step. Why would someone purchase an indentured servant? Why would he forfeit the ownership of present scarce economic resources in order to buy the future services of a person? The answer is obvious: he expects to gain from the transaction. Buyer and seller agree on a present price that they both believe is approximately equal to the *discounted* (by the relevant interest rate) value of that expected future stream of income, in the form of labor services.[15] The buyer buys the future services of the man by using the same process of economic estimation that he uses when buying the services of any tool of production. To get those future economic services from a machine, he must take delivery of the machine that supplies him with the services. Because indentured servitude is rare today, buyers normally rent the services of laborers for a day, a week, or a month at a time.[16] But under a system of indentured servitude, these *labor services* are legally capitalized at the time of purchase, and the buyer takes delivery of the *person* who is to supply them.

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away from bankruptcy and made it one of the top ten in terms of efficiency, in less than two years, and without an infusion of new financial capital, simply by setting up daily prayer meetings open to all employees, and by requiring managers and foremen to show at least some minimal concern about the lives of the workers. He called forth the latent reserves of productivity from previously disgruntled, resentful workers.

15. Technically speaking, the exchange takes place because the *present value of the expected future stream of labor* services from the servant (minus the costs of maintaining the servant) is more valuable, in the eyes of the purchaser, than the expected future income stream of the asset he gives up in the exchange. The buyer and the seller *capitalize the expected future value of the servant*.

16. One of the few exceptions to this rule in the United States is the purchase of a professional athlete's future services. The best amateur athletes usually receive large bonuses in advance when they sign their professional contracts, as well as receiving a guaranteed wage for a specified period of time. They can legally quit the team and forfeit the agreed-upon wage income, but they are legally prohibited from offering their services to a rival team within the same sports league. The bonus capitalizes a portion of their future productivity.

Slaves and indentured servants command a sale price. Why? Because their expected labor services are valuable. These services can be capitalized. The purchaser calculates the present market value of this expected stream of income in *exactly the same way* that he capitalizes the expected future income stream of any commodity. The same rate of interest establishes the discount of the future services of man, land, and machine, and to the same degree. The buyer estimates the proper purchase price of all forms of capital by means of the same statistical techniques.[17] To this extent, the transaction appears to be impersonal, "treating men like machines." But if we look closer, we find that all such transactions are ultimately personal. The wise (profit-seeking) slave-buyer calculates the expected future services of the slave in terms of how well he will treat the slave. He does the same when he estimates the value of a piece of farmland. He even makes such calculations regarding machinery. We speak of "babying" a tool when we really mean treating it with care by lubricating it, servicing it, and recognizing its limits in service. The rate of interest is itself an impersonal number that is the product of all the highly personal time-preferences (discounts for future goods and services) of the many economic decision-makers in the society. Ultimately, there can be no impersonalism in a universe created and providentially sustained by God.[18]

The very fact that bondservants command a price, and owners make rational economic decisions about how much to pay for bondservants, testifies to the reality of the commodity aspect of human labor. The existence of a market for bondservants indicates that men's labor services can be treated as commodities. In short, expected future labor services can be *capitalized*—converted into capital goods that can be bought and sold in the present. This is the definition of every economic commodity: a producer of expected future income that can be priced—bought and sold—today. Present goods (the price) are exchanged for expected future services (income).

If a buyer expects a plot of land to produce a net income of one ounce of gold per year indefinitely, and he also expects a married pair of slaves to produce a net income of one ounce of gold per year,

17. If the tax laws recognized indentured servitude, bondservants would probably be depreciated the way that a machine or any other depreciating asset would be. The United States tax code allows animals and fruit-bearing trees to be depreciated in this fashion.

18. Gary North, *Sovereignty and Dominion: An Economic Commentary on Genesis* (Dallas, Georgia: Point Five Press, [1982] 2012), ch. 1.

including the value of their children over an indefinite period, then he will pay the same price for the plot of land that he will pay for the slaves, other things being equal. The same estimating process governs both transactions, as does the same rate of interest. Both the land and the slaves are capitalized. Their expected future net incomes, when discounted by the prevailing rate of interest, produce the same sales price.

3. The Image of God

The Bible sets forth laws that regulate indentured servitude. This is another example of God's recognition of the image of God in man. It is immoral to treat men as if they were *nothing more than* beasts or burden. He allowed the Israelites to suffer under the crushing burden of slavery in Egypt in order to demonstrate to them the way in which rebellious men who worship other gods—demonic spirits—view their servants:as beasts to be sacrificed, as *nothing more than* commodities. The Egyptian Pharaohs who enslaved them were *reductionists*. They viewed the Israelite males only as beasts of burden or as potential future military enemies (Ex. 1:10). The Pharaoh was willing to kill all of Israel's male infants (Ex. 1:16), just as he might have slaughtered animals. He refused to acknowledge that there are God-ordained limits placed on bondservant-owners. God warns men not to make such an assumption. Men are more than beasts or machines. The commodity factor in human labor is only one aspect of man. A slave is more than the commodity that Aristotle described as "property with a soul."[19]

Nevertheless, the commodity factor is unquestionably one factor. Because the expected income stream produced by human labor can be capitalized according to the rules governing all other expected income streams, there is a potential market for permanent slaves and indentured servants. The Old Testament legitimized a system of private ownership of the *human* means of production. It has been only during the last two centuries that this outlook has become unacceptable.

19. I am using M. I. Finley's translation of *Politics* 1253b: Finley, *Ancient Slavery and Modern Ideology* (New York: Viking, 1980), p. 73. Sir Ernest Barker's translation is less graphic: "an animate article of property." *The Politics of Aristotle* (New York: Oxford University Press, [1946] 1960), pp. 9–10.

E. The Command to Labor

The second principle of the biblical covenant is "hierarchy."[20] The dominion covenant reflects this general covenantal principle: (1) God is over man, (2) man is over his wife, (3) parents are over children, and (4) mankind is over nature. To exercise effective, long-term *dominion over nature*, men must become *subordinate under God*.[21]

Modern democratic theory has steadily begun to reject all four points of this hierarchical worldview. First, God is seen as mythical, or at best a distant, powerless uncle. He does not intervene in human history. He does not "take sides" in mankind's disputes (at least not since World War II). Second, marriage is not seen as hierarchical; divorce has been legitimized legislatively for "unreconcilable differences," and the women's liberation movement has asserted equality between the marriage partners. Third, parents are understood as unreliable supervisors generally; a state-operated school system is to be substituted for parental authority. There is also a growing "children's rights" movement, which promotes a program that includes such provisions as self-determination for children, the right to leave home, the right to all information available to adults, the right of self-education, the right of freedom from physical punishment, the right to sexual freedom, and the right to vote and hold political office.[22] We should recall Isaiah's words: "And I will give children to be their princes, and babes shall rule over them" (Isa. 3:4). Finally, the more radical of the ecology movement's advocates have denied that men are over nature.[23] They have even argued that the idea of man

20. Ray Sutton, *That You May Prosper: Dominion By Covenant*, 2nd ed. (Tyler, Texas: Institute for Christian Economics, [1987] 1992), ch. 2.

21. North, *Sovereignty and Dominion*, chaps. 8, 9. Humanist theologian John C. Raines wrote of Calvin: "Calvin understood the Christian life not as 'a vessel filled with God' but as an active 'tool and instrument' of the Divine initiative. But this is precisely our point. Active toward the world, the Christian knows himself as utterly passive and obedient toward God, whose Will it is his sole task to discover and obey." Raines, "From Passive to Active Man: Reflections on the Revolution in Consciousness in Modern Man," in Raines and Thomas Dean (eds.), *Marxism and Radical Religion: Essays Toward a Revolutionary Humanism* (Philadelphia: Temple University Press, 1970), p. 114.

22. Richard Farson, *Birthrights* (New York: Macmillan, 1974); cited by John Whitehead, *Parents' Rights* (Westchester, Illinois: Crossway, 1985), pp. 24–25. This movement began to be noticed in the mid-1970s: "Drive for Rights of Children," *U.S News and World Report* (Aug. 15, 1974).

23. This view of the "autonomous" environment became part of the U.S. Park Service's policies regarding forest fires. Unless a fire was started by a camper or an arsonist, it was left alone to burn itself out "naturally." In the drought-ridden summer of 1988, a series of lightning-induced fires began in Yellowstone National Park. They

over nature is a terrible legacy of Christianity, and that it has led to mass pollution.[24]

1. Unfaithful Servants and Indentured Servitude

Some people are unfaithful servants. They seek to escape the moral and institutional obligations of God's dominion covenant. One of the ways historically that God has put men visibly under the terms of His dominion covenant is through indentured servitude. Some ethical rebels can be made more effective laborers in God's kingdom through indentured servitude. Indentured servitude is an earthly manifestation of the authority-hierarchy relationship. The New Testament reconfirms the Old Testament view of marriage as a covenantal yoke,[25] and it reminds men that this yoke is analogous to the relationship of Christ to His church (Eph. 5:21–28). We must become servants of God in order to avoid remaining slaves to Satan.

Human slavery in history testifies to the reality of sin, as well as to the need of some rebels and some weak people for institutional subordination. Private property in slaves therefore testifies to the need for men to learn submission to God, who is the personal Sovereign who owns the universe.[26] This thought is repulsive to the modern democratic faith. Modern democratic theory rejects the idea that private property in the form of indentured servants can deal effectively with such issues as depravity, rebellion, laziness, and crime. Democratic theorists refuse to acknowledge the legitimacy of indentured servitude as a God-ordained private hierarchy that promotes the fulfillment of the dominion covenant. They attack private slavery as the greatest of all evils in history. Then they pass laws that make people slaves to the state. They do not reject the hierarchical structure of slavery; they merely substitute the state for the private slave-owner,

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spread, as the saying goes, like wildfire. By the time winter snows began to fall, these fires had burned about 800,000 acres of land in three states. The President of the United States later admitted that he had not known about this "let it burn" policy. Public outrage forced the government officially to reverse this policy on forest fires. For a highly critical analysis of the National Park Service in general, written before this fire, see Alston Chase, *Playing God in Yellowstone: The Destruction of America's First National Park* (New York: Atlantic Monthly Press, 1986).

24. The key document is Lynn White, Jr., "The Historical Roots of Our Ecologic Crisis," *Science* (10 March 1967). For a critique of White's thesis, see R. V. Young, Jr., "Christianity and Ecology," *National Review* (Dec. 20, 1974). For my analysis, see *Sovereignty and Dominion*, ch. 4:A.

25. Chapter 27.

26. Gary DeMar, *Ruler of the Nations: Biblical Blueprints for Government* (Ft. Worth, Texas: Dominion Press, 1987).

and then they rename this relationship with a term more acceptable politically, such as "public welfare" which is to be paid for by "progressive taxation." They raise taxes above 40% of a family's income, and they call this "paying your fair share." Ancient Egypt, which under Joseph suffered from a 20% income tax rate, is called "oriental despotism."[27] Contemporary taxation at twice or three times this level is called progressive democratic fiscal policy.

2. Two Kinds of Ancient Slavery

Democratic theorists make no ethical distinction between the Hebrews' slave status in ancient Egypt and the enslavement of heathens in ancient Israel. All private chattel slavery is dismissed as evil. "Slavery is an example of an institutionalized evil," wrote liberation theologian Ronald Sider.[28] The Bible, however, does distinguish sharply between permanent slavery that was regulated by God's law and slavery that was antinomian—unregulated by God's law. This is why Paul was quite ready to have the escaped slave Onesimus return to the Christian household of Philemon (Phm. 10–12).

Men must serve one of two masters (Matt. 6:24).[29] Each supernatural master has used slavery as part of his particular program of kingdom development. We are either under God's yoke or Satan's (Matt. 11:29–30). Christ's yoke is freedom; Satan's is bondage (Gal. 5:1). The ethical question of slavery—which form is righteous and which form is evil—must be answered by an appeal to biblical law. *A retroactive condemnation of all ancient slavery is biblically illegitimate; it reflects the critics' ethical submission to Satan*. When the Bible affirms the legitimacy of any institution, even if only for a millennium or two, then it is sin to call that institution universally evil, without qualification or respect to time. Such an accusation is analogous to calling God evil. Theologians and social philosophers who call God evil are dancing at the edge of permanent slavery in the lake of fire.

Why would God authorize indentured servitude? Because rebels sometimes seek to escape the requirements of the dominion covenant. They may work in ways prohibited by God. God therefore has placed some men under indentured servitude as a *means of evangelism*, and

27. Karl Wittfogel, *Oriental Despotism: A Comparative Study of Total Power* (New Haven, Connecticut: Yale University Press, 1957).

28. Ronald J. Sider, "Words and Deeds," *Journal of Theology for Southern Africa* (Dec. 1979), p.38.

29. Gary North, *Priorities and Dominion: An Economic Commentary on Matthew*, 2nd ed. (Dallas, Georgia: Point Five Press, [2000] 2012), ch. 14.

also as a means of extracting from them the *service due to Him*. Men who would otherwise perish are also placed under the care of a godly household. The most famous example in the Bible of this is the case of the Gibeonites, who tricked Joshua into taking them as permanent slaves—hewers of wood and drawers of water (Josh. 9:27)—rather than perish at his hand or be forced out of the land of Canaan. Their servitude was voluntary. This was not true of the kidnapped Africans who were brought to North America.[30]

Conclusion

Men can legitimately be evaluated as commodities, meaning as scarce economic resources that are still in demand at a price above zero. A man whose services are not in demand at zero price—a man who is not a producer of the commodity of labor—is in sorry shape unless he has a great deal of income-producing capital.

The Bible's slave laws confirm this obvious economic truth. So valuable is "man, the commodity," that specific rules that limit the exploitation of this commodity by other men have been established by God. The key limitation is the six-year maximum period of indentured servitude (Deut. 15:12). This limitation keeps down the price of the human commodity by *restricting the period of time in which his services can be lawfully capitalized by an owner*. Even in the case of lifetime slavery, Old Testament law restricted slave-owners in their dealings with slaves. It is not true, as M. I. Finley asserted, that "The failure of any individual slaveowner to exercise all his rights over his slave-property was always a unilateral act on his part, never binding, always revocable."[31] In Greece and Rome, perhaps; not in ancient Israel. God, then as now, always warned those under the terms of His covenant that those in authority over men are also under the authority of other men, and that all men are under God and His law.

The Bible uses the economic self-interest of the owner to supplement the self-government and therefore the self-restraint that owners are expected to demonstrate to those under their authority. The bondservant is a valuable commodity. God tells bondservant-owners, "Handle with care, for these people are made in My image!" If they refuse to listen to God, then perhaps they will listen to the market. If they refuse to listen either to God or to the market, then the civil government must step in and enforce the law of God regarding in-

30. Appendix K.

31. Finley, *Ancient Slavery and Modern Ideology*, p. 74.

dentured servitude. If the civil government refuses to obey God in this way, then God imposes other forms of negative sanctions: war, pestilence, or famine. There is no better example of this inescapable covenantal process in New Covenant history than the history of slavery in the American South.

Modern democratic theory has denied the legitimacy of biblical indentured servitude, but it has substituted a new form of slavery, which is in fact a very ancient form of slavery: *slavery to the state*. The state is a slave-owner that wants no private competition. It wants people placed in permanent bondage to the state. It establishes what sociologist Max Weber described as the bureaucratic cage.[32] It calls this system democratic freedom.

32. Gary North, "Max Weber: Rationalism, Irrationalism, and the Bureaucratic Cage," in North (ed.), *Foundations of Christian Scholarship: Essays in the Van Til Perspective* (Vallecito, California: Ross House Books, 1976), ch. 8.

37

CRIMINAL LAW AND RESTORATION

> *If men strive, and hurt a woman with child, so that her fruit depart from her, and yet no mischief follow: he shall be surely punished, according as the woman's husband will lay upon him; and he shall pay as the judges determine. And if any mischief follow, then thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe.*
>
> EXODUS 21:22–25

The theocentric principle here is that man is made in God's image and therefore must be protected by civil law. The husband of the victimized woman represents God the Judge to the convicted criminal. The state is required to impose sanctions specified by the husband. The violent person who has imposed on the woman and the child the risk of injury or death must compensate the family. The judges do retain some degree of authority in specifying the appropriate sanction. The criminal must pay "as the judges determine." In the absence of actual physical harm, there is no rigorous or direct way to assess the value of this risk of injury or death, so the state does not allow the husband to be unreasonable in imposing sanctions.

Where physical damage can be determined objectively, the criminal must pay on an "eye for eye" basis. This is the judicial principle known as the *lex talionis*. The punishment must fit the magnitude of the violation; the violation is assessed in terms of the damages inflicted.

A. Controversy Over Abortion

Exodus 21:22–25 has recently become one of the most controversial passages in the Old Testament. Prior to the 1960s, when the abortion issue again began to be debated publicly in the United States after

half a century of relative silence,[1] only the second half of this passage was controversial in Christian circles: the judicial requirement of "an eye for an eye." The abortion aspect of the argument was not controversial, for the practice of abortion was illegal and publicly invisible. A physician who performed an abortion could be sent to jail, though not for murder, which abortion is. It was clearly understood by Christians that anyone who caused a premature birth in which the baby died or was injured had committed a criminal act, despite the fact that the person did not plan to cause the infant's injury or death. The abortion described in the text is the result of a man's battle with another man, an illegitimate form of private vengeance for which each man is made fully responsible should injury ensue, either to each other (Ex. 21:18–19)[2] or to innocent bystanders. If this sort of "accidental" abortion is treated as a criminal act, how much more a deliberate abortion by a physician or other murderer! Only when pagan intellectuals in the general culture came out in favor of abortion on demand did pro-abortionists within the church begin to deny the relevancy of the introductory section of the passage.

This anti-abortion attitude among Christians began to change with the escalation of the humanists' pro-abortion rhetoric in the early 1960s. Christian intellectuals have always taken their ideological cues from the humanist intellectuals who have established the prevailing "climate of opinion," from the early church's acceptance of the categories of pagan Greek philosophy to the modern church's acceptance of tax-funded, "religiously neutral" education. As the humanists' opinions regarding the legitimacy of abortion began to change in the early 1960s,[3] so did the opinions of the Christian intellectual community. Speaking for the dispensationalist world of social thought, dispensationalist author Tommy Ice forthrightly admitted in a 1988 debate: "Premillennialists have always been involved in the present world. And basically, they have picked up on the ethical positions of their contemporaries."[4] (He defended this practice, it should be noted.) The shift in Christian opinion regarding the illegitimacy of

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1. Marvin Olasky, *The Press and Abortion, 1838–1988* (Hillsdale, New Jersey: Lawrence Erlbaum Associates, 1988), ch. 6. This book shows that in the late nineteenth century, the battle over abortion, as revealed in the press, was widespread.

2. Chapter 35.

3. *Ibid*., chaps. 10, 11.

4. Cited in Gary DeMar, *The Debate Over Christian Reconstruction* (Ft. Worth, Texas: Dominion Press, 1988), p. 185. The debate was Dave Hunt and Tommy Ice vs. Gary North and Gary DeMar.

abortion took place throughout the 1960s and early 1970s.

The moral schizophrenia of contemporary pietism can be seen when anti-abortion picketers confront killer physicians at their offices with some variation of "Smile! God loves you" or "God hates abortion but loves abortionists." On the contrary, God hates abortionists, and He demands that the civil government execute them. Where are Christian protesters who pray the imprecatory psalms, such as Psalm 83? Where are they calling publicly on God to bring judgment against abortionists and their political allies?[5] Only when Christian anti-abortionists at last openly and enthusiastically admit that the Bible demands public execution for all convicted abortionists, and also for the women who pay for them, will they at last be proclaiming the Bible's judicial requirements.

The fact that they draw back from proclaiming this testifies to the appalling lack of biblical thinking that prevails in contemporary Christianity. *The vast majority of Christians hate God's Bible-revealed law far more than they hate either abortion or abortionists*. They would far rather live in a political world that is controlled by humanists who have legalized abortion than in a society governed by Christians in terms of biblical law. So, God has answered the desire of their hearts. He has done to modern Christians what He did to the Israelites in the wilderness: "And he gave them their request; but sent leanness into their soul" (Ps. 106:15).

B. The Legalized Slaughter of the Innocents

I do not intend to deal in detail with the question of abortion in this context.[6] There is no doubt that Exodus 21:22–25 does apply to abortion.[7] The legal issue is clear: *victim's rights*. In all cases of public

5. Gary North, *When Justice Is Aborted: Biblical Standards for Non-Violent Resistance* (Ft. Worth, Texas: Dominion Press, 1989), pp. 88–94.

6. J. J. Finkelstein pointed out that some variation of this law—the jostled woman who aborts her infant—is found in many of the ancient law sources. Finkelstein, *The Ox That Gored* (Philadelphia: American Philosophical Society, 1981), p. 19n. It is treated at length in Hammurabi's laws (209–14), Hittite laws (17–18), and Middle Assyrian laws (21): *Ancient Near Eastern Texts Relating to the Old Testament,* ed. James B. Pritchard, 3rd ed. (Princeton, New Jersey: Princeton University Press, 1969), Part II, Legal Texts. Finkelstein argued that the text is probably a literary device rather than legal, since the likelihood of an abortion occurring in this way is minimal. What he did not consider is that as a case law, it was intended to be a minimal application example: if, in this biologically unlikely situation, the one causing harm is fully liable, how much more the liability of an actual abortionist.

7. R. J. Rushdoony, *The Myth of Over-Population* (Nutley, New Jersey: Craig Press, 1969), Appendix 3.

evil that the Bible prohibits, there must be judicial representatives of God: the victims are the primary representatives, and the various covenant officials are secondary representatives. When the victims cannot defend their interests, then the covenantal officers become the legal representatives of the victims.[8] The potential victims in this case are the unborn infants whose lives are sacrificed on the altar of convenience. Because they are incapable of speaking on their own behalf, God empowers their fathers to speak for them, or in cases where a father remains silent, God empowers the civil government to speak for them: first to prohibit abortion, and second to impose the death penalty on all those who are involved with abortion, either as murderers (mothers) or as their paid accomplices (physicians, nurses, office receptionists, and so forth).

Exonerating mothers who pay to have abortions is the same as retroactively exonerating slave buyers who bought recently kidnapped Africans from slave traders. The buyers liked to think of the slave traders as beneath them both morally and socially. In fact, the slave buyers were far more morally corrupt. They made the slave trade profitable. The traders were merely hired servants of the buyers. Bringing it closer to home, it would be comparable to arresting pimps and prostitutes, but letting the Johns off the hook. If the police put the buyers in jail alongside the pimps and hookers, there would be howls of protest, but the demand for prostitutes would decline.[9]

1. Christian Academic Spokesmen for Legalized Abortion

All this is conveniently ignored by Christian abortionists and their academically respectable spokesmen.[10] Examples of pro-abortionists, especially physicians, in evangelical churches can be found in a book put out in 1969 by the Christian Medical Society, *Birth Control and the Christian: A Protestant Symposium on the Control of Human Reproduction*, edited by Walter O. S. Pitzer and Carlyle L. Saylor.[11] Bruce K. Waltke, then a Dallas Theological Seminary professor, and briefly a professor at Westminster Theological Seminary in Philadelphia, explicitly stated in that book that Exodus 21:22 teaches that "the fetus is not reckoned as a soul."[12] (He subsequently reversed his pro-abortion stance.) Dr.

8. North, *When Justice Is Aborted*, ch. 2.

9. Legislators will resist this suggestion, who as customers, do not want to risk having pimps and prostitutes testify against them in order to get reduced sentences.

10. *Ibid.*, Appendix A.

11. Wheaton, Illinois: Tyndale House, 1969.

12. *Ibid.*, p. 11.

M. O. Vincent, psychiatrist, reported that the symposium moved him to conclude that "the foetus has great and developing value, but is less than a human being. It will be sacrificed only for weighty reasons."[13] Predictably, he refused to spell out in detail what these weighty reasons are. Dr. William B. Kiesewetter, before leading the reader to his conclusion that a Christian physician friend was doing the right thing when he "terminated the pregnancy" (never seen as terminating the baby) of a missionary's wife, warned against "Rigid, authoritarian evangelicals [who] so often extract from the Word of God precepts which they then congeal into a legalism by which everyone is admonished to live."[14] (His main problem is not with rigid, authoritarian evangelicals. His main problem is with the rigid, authoritarian God who commanded Moses to write Exodus 21:22–25. This is the main problem faced by all spokesmen who blithely deny the continuing judicial authority of God's Bible-revealed law, and who then proceed to recommend the violation of God's law whenever convenient.)

In short, it is supposedly not necessarily immoral to take money for performing an abortion, provided that you are licensed by the medical profession to do so. These self-deluded physicians would bring a non-physician to court for practicing an abortion—an infringement on their state-licensed monopoly—but not a licensed colleague. Such was the state of late twentieth-century medical ethics, including the ethics of self-professed Christians.

A book by D. Gareth Jones, Professor of Anatomy at the University of New Zealand, *Brave New People: Ethical Issues at the Commencement of Life* (1984), created a national Christian protest in the United States against its neo-evangelical publisher, Inter-Varsity Press. The book promoted a view of the "foetus" that would allow abortion in uncertain, undefined cases. Franky Schaeffer, the son of Francis Schaeffer (*Whatever Happened to the Human Race?*), mounted a protest in 1984 which led to the resignation of the editor of IVP and the scrapping of the book. Eerdmans republished it the next year. It is still published by IVP in Britain.[15]

2. A Question of "Barbaric" Sanctions

Christian scholars generally choose to ignore Exodus 21:22–25, and then they spend their time defending mass murder in the name of

13. *Ibid.*, p. 213.
14. *Ibid.*, p. 561.
15. For a critique of this book, see Appendix B:E.

biblical ethics and "compassion"—compassion for murderous women and their well-paid, state-licensed accomplices. Meanwhile, these critics of biblical law are busy challenging any defenders of the law with criticisms along these lines: "You would reimpose the barbaric principle of poking out a man's eye or cutting off his hand. This is nothing but vengeance, a return to savagery. What possible good would it do the victim to see the assailant suffer physical damage identical to his own? Why not impose some sort of economic restitution to the victim? To inflict permanent injury on the assailant is to reduce his productivity and therefore the wealth of the community. By returning to Old Testament law, you are returning to the tribal laws of a primitive people."[16] This line of criticism incorrectly assumes that the *lex talionis* principle was not in fact designed by God to encourage economic restitution to the victim from the criminal. Chapter 38 demonstrates that *lex talionis* promotes economic restitution.

Nevertheless, the question remains: *Which is truly "barbaric," mass murder through legalized abortion or the required judicial sanctions revealed in biblical law*? Christian antinomians of our day—that is to say, virtually all Christians—have voted for the barbaric character of biblical law. They are faced with a choice: Minimal sanctions against abortion or the civil enforcement of biblical law? Their answer is automatic. They shout to their elected civil magistrates, "Give us Barabbas!" Better to suffer politically the silent screams of murdered babies, they conclude, than to suffer the theocratic embarrassment of calling for the public execution of convicted abortionists.[17] The babies who are

16. Henry Schaeffer wrote a book called *The Social Legislation of the Primitive Semites* (New Haven, Connecticut: Yale University Press, 1915). The title is revealing. He did not comment on the "eye for eye" passages.

17. We must not miss the point: the inevitable issue here is *theocracy*. When a Christian calls for the execution of the convicted abortionist, he is necessarily calling for the enforcement of God's revealed law by the civil magistrate. This fear of being labeled a theocrat is why James Dobson chose to weaken his response to a pro-abortion physician by not dealing forthrightly with Exodus 21:22–25: "Do you agree that if a man beats his slave to death, he is to be considered guilty only if the individual dies instantly? If the slave lives a few days, the owner is considered not guilty (Exodus 21:20–21)[?] Do you believe that we should stone to death rebellious children (Deuteronomy 21:18–21)? Do you really believe we can draw subtle meaning about complex issues from Mosaic law, when even the obvious interpretation makes no sense to us today? We can hardly select what we will and will not apply now. If we accept the verses you cited, we are obligated to deal with every last jot and tittle." Dobson, "Dialogue on Abortion," in James Dobson and Gary Bergel, *The Decision of Life* (Arcadia, California: Focus on the Family, 1986), p. 14. I handed him a copy of *Tools of Dominion* in 1990, and said the book provided the answer to his question. He has yet to respond after 20 years. He knows where I am and who I am. I once raised $50,000 for his ministry in two minutes at a meeting.

targeted for destruction have only a confused, inconsistent, waffling, squabbling, rag-tag army of Christians to speak for them authoritatively in God's name inside the corridors of political and judicial power. Their defenders are agreed: "Abortion is the lesser of two evils, if the alternative is theocracy."[18]

In stark contrast is the tiny handful of Christians[19] who confidently believe in the whole Bible, including Exodus 21:22–25, and who have therefore confidently voted against abortion as the true barbarism and for biblical law as the sole long-term foundation of Christian civilization. But most Christians have self-consciously suppressed any temptation to think about this dilemma, one way or the other. The thin picket lines in front of abortion clinics testify to the thoughtlessness of Christians in our day. (So do the thin shelves of the Christian bookstores.)[20]

C. Restitution and Vengeance

The "eye for an eye" principle is known by the Latin phrase, *lex talionis*, or "law of retaliation." The English word, "retaliate," is derived from the same Roman root as "talionis." Today, "retaliate" means to inflict injury, but earlier English usage conveyed a broader meaning:*to pay back or return in kind*, including good will.[21] According to one source, the *lex talionis* was a Roman law that specified that anyone who brought an accusation against another citizen but could not prove his case in the courts would suffer the same penalty that he had sought to inflict on the defendant.[22] (This was a perverted version of the biblical principle of the law governing deliberate perjury, found

He remains the single most influential Protestant fundamentalist social commentator in the United States. For him to remain silent for two decades is revealing.

18. Christian anti-abortionists will attempt to find a third choice. It may be natural law. It may be emotion. It may be the will of the people. It may be to some less familiar version of common-ground philosophy, meaning baptized humanism. What it will not be is an appeal to the whole Bible as the sole authoritative will of God.

19. Christian Reconstructionists or theonomists.

20. James Jordan's book, *The Law of the Covenant: An Exposition of Exodus 21–23* (Tyler, Texas: Institute for Christian Economics, 1984), was removed from the shelves of a local Christian bookstore in Tyler when the store's owner discovered that Jordan had called for the execution of the aborting physician and the mother. The owner dared not take the heat for selling a book which announced: "Until the anti-abortion movement in America is willing to return to God's law and advocate the death penalty for abortion, God will not bless the movement. God does not bless those who despise His law, just because pictures of salted infants make them sick" (p. 115).

21. See the *Oxford English Dictionary*: "retaliate."

22. *Cyclopaedia of Biblical, Theological, and Ecclesiastical Literature*, ed. John McClintock and James Strong (New York: Harper & Bros., 1894), vol. X, p. 165: "Talionis, Lex."

in Deuteronomy 19:16–21, which concludes with a restatement of the "eye for eye" requirement in verse 21.[23] The law reads: "Then shall ye do unto him [the false witness], as he had thought to have done unto his brother:so shalt thou put the evil away from among you" [v.19].[24] Only if the innocent person could prove perjury on the part of his accuser could he demand that the civil government impose on the latter the penalty that would have been imposed on him.[25])

Not every Bible commentator has seen the "eye for eye" sanction as primitive. Shalom Paul wrote: "Rather than being a primitive residuum, it restricts retaliation to the person of the offender, while at the same time limiting it to the exact measure of the inju-ry—thereby according equal justice to all."[26] W. F. Albright, the archeologist who specialized in Hebrew and Palestinian studies, wrote: "This principle may seem and is often said to be extraordinarily primitive. But it is actually not in the least primitive. Whereas the beginnings of *lex talionis* are found before Israel, the principle was now extended by analogy until it dominated all punishment of injuries or homicides. In ordinary Ancient Oriental jurisprudence, men who belonged to the higher social categories or who were wealthy simply paid fines, otherwise escaping punishment... So the *lex talionis* (is)... the principle of equal justice for all!"[27] Albright understood some of the implications of the passage for the principle of equal justice for all, meaning *equality before the law*. Nevertheless, the myth of "primitive" legislation still clings in people's minds.[28] It seems to some Christians to be a needlessly bloody law. In a reaction against the rigor of this judicial principle, liberal scholar Hans Jochen Boecker went so far as to argue

23. Gary North, *Inheritance and Dominion: An Economic Commentary on Deuteronomy*, 2nd ed. (Dallas, Georgia: Point Five Press, [1999] 2012), ch. 45.

24. The same rule applied in Hammurabi's Code: "If a seignior came forward with false testimony in a case, and has not proved the word which he spoke, if that case was a case involving life, that seignior shall be put to death. If he came forward with (false) testimony concerning grain or money, he shall bear the penalty of that case." CH, paragraphs 3–4: *Ancient Near Eastern Texts*, p. 166.

25. A moral judicial system would impose on the accuser or his insurance company all court costs, plus the costs incurred by the defendant in defending himself.

26. Shalom Paul, *Studies in the Book of the Covenant in the Light of Cuneiform and Biblical Law* (Leiden: E. J. Brill, 1970), p. 40.

27. W. F. Albright, *History, Archeology, and Christian Humanism* (New York, McGraw-Hill, 1964), p. 74; cited in *ibid*., p. 77.

28. Hammurabi's "code" had similar rules: "If a seignior has destroyed the eye of a member of the aristocracy, they shall destroy his eye. If he has broken another seignior's bone, they shall break his bone." CH, paragraphs 196–97. If an aristocrat destroyed the eye of a commoner, however, the *lex talionis* did not apply: he paid one mina of silver (CH 198). *Ancient Near Eastern Texts*, p. 175.

that Old Testament law was not actually governed by *lex talionis*,[29] that it only appears in three instances, and that it is a holdover of early nomadic law.[30]

1. "Vengeance Is Mine"

Vengeance in the Bible is God's original responsibility. "To me belongeth vengeance, and recompence;their foot shall slide in due time: for the day of their calamity is at hand, and the things that shall come upon them make haste" (Deut. 32:35). "If I whet my glittering sword, and mine hand take hold on judgment; I will render vengeance to mine enemies, and will reward them that hate me. I will make mine arrows drunk with blood, and my sword shall devour flesh . . ." (Deut. 32:41–42a). All nations are required to rejoice because of God's willingness and ability to avenge His people: "Rejoice, O ye nations, with his people:for he will avenge the blood of his servants, and will render vengeance to his adversaries, and will be merciful unto his land, and to his people" (Deut. 32:43). These passages, and many others in the Old Testament, are the foundation of Paul's summary statement: "Vengeance is mine; I will repay, saith the Lord" (Rom. 12:19b). "For we know him that hath said, Vengeance belongeth unto me, I will recompense, saith the Lord. And again, The Lord shall judge his people" (Heb. 10:30).

God makes it clear that He sometimes intervenes personally in history and brings bloody vengeance on His enemies. The state, under limited and Bible-defined circumstances, possesses an analogous authority. It is therefore highly inaccurate to say that the authority to impose vengeance in history is exclusively God's prerogative. God has delegated to the civil government its limited and derived sovereignty to impose physical vengeance. The state is allowed, by the testimony of witnesses, to impose the death penalty and other physical punishments. *Perfect justice must wait until the day of judgment; so must perfect vengeance*.[31] But men do not have to wait until the end of time in order to see preliminary justice done, and therefore preliminary vengeance imposed.

Vengeance is a form of *restitution*. "Vengeance is mine; I will *repay*." This repayment is in the form of punishment and even permanent

29. Hans Jochen Boecker, *Law and the Administration of Justice in the Old Testament and Ancient East*, trans. Jeremy Moiser (Minneapolis, Minnesota: Augsburg, [1976] 1980), pp. 171–72.

30. *Ibid.*, pp. 174–75.

31. Chapter 19.

judgment. God *pays back* what is owed to the sinner. It is *repayment in kind*, an original meaning of "retaliate." Capital crimes require the public execution of the guilty person. In the case of crimes less repugnant to God than capital crimes, economic restitution is often paid by the criminal to the victim. But restitution is ultimately owed to God.[32] The victim, as God's image bearer, deserves his restitution, just as God deserves His. When repayment in kind is not made, a sense of injustice prevails. The victim, or the family members who survive the victim, understand that a convicted criminal who is not forced to make restitution has evaded justice. Such an escape is seen as being unfair.

2. Fair Warning

God reminds His people that His ultimate justice cannot be evaded. This testimony of a final judgment is provided by the sanctions imposed by the authorities. Historical sanctions are designed by God to fit the crime in order to persuade men that *the universe is ultimately fair, for both time and eternity are governed by the decree of God*. God's people should not despair because some men escape the earnest (down payment) of the final justice that is coming. Psalm 73 is a reminder of the seeming injustice of life, and how the wicked are finally rewarded according to their deeds. "For I was envious at the foolish, when I saw the prosperity of the wicked" (Ps. 73:3). David was beaten down by events (v. 2), yet he saw all the good things that come to the wicked in life (vv. 4–5, 12). He flayed himself with such thoughts, "Until I went into the sanctuary of God; then understood I their end. Surely thou didst set them in slippery places:thou castedst them down into destruction. How are they brought into desolation, as in a moment! They are utterly consumed with terrors" (vv. 17–19). David finally admits: "So foolish was I, and ignorant: I was as a beast before thee" (v. 22).[33]

The relationship between covenantal faithfulness and external prosperity is clearly taught in the Bible (Deut. 28:1–14). So is the relationship between covenant-breaking and calamity (Deut. 28:15–68). This system of sanctions applies to the whole world, not just in Old Testament Israel. Deny this, and you have also denied the possibil-

32. R. J. Rushdoony, *The Institutes of Biblical Law* (Nutley, New Jersey: Craig Press, 1973), pp. 525–30.

33. Gary North, *Confidence and Dominion: An Economic Commentary on Psalms* (Dallas, Georgia: Point Five Press, 2012), ch. 17.

ity of an explicitly and exclusively Christian social theory. Christians who deny the continuing relevance of Deuteronomy 28's sanctions in post-Calvary, pre-Second Coming history should be warned by David's admission that he had been foolish to doubt these relationships. The concept of *slippery places* is not often discussed, but it is very important. God sets people high *in order to make them slide*, visibly, before the world. God said to Pharaoh: "For now I will stretch out my hand, that I may smite thee and thy people with pestilence; and thou shalt be cut off from the earth. And in very deed for this cause have I raised thee up, for to show in thee my power; and that my name may be declared throughout all the earth" (Ex. 9:15–16). The temporary prosperity of the wicked must not be viewed as evidence that would call into question the long-term relationship between covenant-breaking and destruction.

Vengeance is legitimate, but not as a private act. It is always to be covenantal, governed by God's institutional monopoly, civil government. James Fitzjames Stephen said it best: "The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite."[34] The private vendetta is always illegitimate; public vengeance is sometimes legitimate. There are many examples of private vengeance not sanctioned by God: gangster wars, clan feuds, the murder of those who testify against a criminal or syndicate, and murders for breaking the code of silence of a secret society. It is a crime against God Himself to take any oath that testifies to the right of any private organization or voluntary society to inflict physical violence, especially death, for breaking the oath or any other violation of the "code," even if this oath's invoked penalties are supposedly only "symbolic" rather than literal. I refer here to Masonic oaths,[35] but

34. James Fitzjames Stephen, *A History of the Criminal Law in England* (London: Macmillan, 1863), II, p. 80. Cited by Ernest van den Haag, *Punishing Criminals: Concerning a Very Old and Painful Question* (New York: Basic Books, 1975), p. 12.

35. That the Freemasons adopt a covenantal view of the self-maledictory oath is admitted in *The Encyclopedia of Freemasonry*, a standard Masonic publication. The author of the section on "Oath" discussed the objections raised in the nineteenth century by the Roman Catholic Church and the Scottish seceders to Masonic oaths. He referred to the "sacred sanction" of an oath, and insists on the legitimacy of "the invocation of the Deity to witness" the oath. He cited Dr. Harris' *Masonic Discourses*: "What the ignorant call 'the oath,' is simply an obligation, covenant, and promise, exacted previously to the divulging of the specialties of the Order, and our means of recognizing each other; . . ." Explaining away the accusation that these secret oaths are taken in religious ceremonies, the author says: "Oaths, in all countries and at all times, have been accompanied by peculiar rites, intended to increase the solemnity and reverence of the act. . . . In all solemn covenants the oath was accompanied by a sacrifice; . . ." He admitted

also to any other similar oath. For example, the oath of an Entered Apprentice of the Masonic order ends with these words: "...binding myself under no less penalty than that of having my throat cut from ear to ear, my tongue torn out by its roots and buried in the rough sands of the sea at low-water mark where the tide ebbs and flows twice in twenty-four hours, should I ever knowingly or willingly violate this my solemn oath and obligation as an Entered Apprentice Mason."[36] Such an oath affirms the legitimacy of private institutional vengeance—vengeance applied by institutions that have not been assigned the state's limited sovereignty to serve as God's agency of vengeance. This sort of physical vengeance is prohibited by biblical law, but the Bible does not condemn all earthly vengeance. The state is an agency of God's vengeance. So is the church, but the church may not lawfully impose physical vengeance, while the state can. Therefore, no church can legitimately invoke oaths or oath signs similar in form to secret society blood oaths. A church that does this has marked itself as a cult.

D. Limiting the State

The authority to impose vengeance is limited. This authority is too easily abused for God not to place Bible-revealed restraints on it. The officers of the civil government readily overstep their authority. The state has often been seen as divine because it possesses the ability to impose the death penalty and other punishments. What the Bible presents as a limited, derived sovereignty, men have defined as an ultimate, original sovereignty. To combat this false interpretation, biblical law restrains the officers of the state by imposing strict limitations on their enforcement of law. God's law must be enforced, and this law establishes criteria of evidence and a standard of justice. This standard is "an eye for an eye." A popular slogan in the modern world promotes a parallel juridical principle: "The punishment should fit the crime."

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that a Masonic oath may have sanctions attached, even a capital penalty. All oaths do, he insists. This is "an attestation of God to the truth of a declaration, as a witness and avenger; and hence every oath includes in itself, and as its very essence, the covenant of God's wrath, the heaviest of all penalties, as the necessary consequence of its violation." Albert G. Mackey, *The Encyclopedia of Freemasonry and Its Kindred Sciences*, 2 vols., rev. ed. (New York: Masonic History Co., 1925), II, pp. 522–23.

36. *King Solomon and His Followers* (New York: Allen Pub. Co., 1943); cited in E. M. Storms, *Should a Christian Be a Mason?* (Fletcher, North Carolina: New Puritan Library, 1980), p. 63.

1. The Punishment Should Fit the Crime

Why should the punishment fit the crime? What ethical principle leads Western people to believe that the Islamic judicial practice of cutting off a pickpocket's hand is too severe a punishment? After all, this will make future pickpocketing by the man far less likely. Why not cut off his other hand if he is caught and convicted again? People who have grown up in the West are repelled by the realization that such punishments have been imposed in the past, and are still imposed in Muslim societies.[37] Why this repulsion? Because they are convinced that the punishment exceeds the severity of the loss imposed on the victim by the thief.

The Bible teaches that the victim must have his goods restored two-fold (Ex. 22:4, 7), four-fold (for stealing a sheep), or five-fold (for stealing an ox) (Ex. 22:1).[38] The passage on restitution in Leviticus 6 indicates that if the thief turns himself in before the authorities identify him as the thief, he must restore the principal (6:4), and must also add a 20% payment—a double tithe—presumably because of the false oath (6:5). The restitution is equal to the value of the item stolen, and the penalty is one-fifth of this.[39]

37. This is Islam's *Shari'a* law. It is officially the civil law in Mauritania, where such amputations are still imposed: Roger Sawyer, *Slavery in the Twentieth Century* (London: Routledge and Kegan Paul, 1986), p. 15. *Shari'a* was reimposed in Sudan in 1988. Complained M. Ismail of Arlington, Virginia in a letter to the editor: "As a Sudanese, I feel that the previous legal code, which was an adoption of the British secular code, was a colonial yoke that disfigured our national independence." *Washington Times* (Oct. 3, 1988). Better to disfigure pickpockets than Sudan's national independence, Mr. Ismail was saying.

38. The seven-fold restitution of Proverbs 6:31 appears to be a *symbolic statement* regarding the comprehensive nature of restitution. The hungry thief who is destitute and who steals food must repay "all the substance of his house," meaning that what little he owns is forfeited when the normal two-fold restitution payment is imposed. A rich man who steals bread would not be made destitute by a two-fold payment. The poor thief has to pay to the limits of his wealth, despite his "extenuating circumstances," while the rich thief who steals for the love of evil-doing is barely touched financially. In short, the law plays no favorites. It does not respect persons. The perverse rich thief is not required to pay any greater percentage than the impoverished thief. The seven-fold vengeance of God against anyone who might persecute Cain is another example of the language of fullness (Gen. 4:15). It means full judgment. Christ's words in Matthew 18 also indicate fullness: "Then came Peter to him, and said, Lord, how oft shall my brother sin against me, and I forgive him? Till seven times? Jesus saith unto him, I say not unto thee, Until seven times: but, Until seventy times seven" (vv. 21–22). "Seventy times seven" is hyperbolic language; seventy times "fullness" means totality. Such forgiveness is not to be forgiveness apart from biblical restitution, however; the principle of forgiveness is not to be used to subsidize evil: Rushdoony, *Institutes*, p. 463.

39. The King James translation reads: "he shall even restore it in the principal, and shall add the fifth part more thereto" (6:5). The New English Bible is clearer: "He shall

The Bible does not teach that a convicted man's future productivity should be utterly destroyed by the judges, except in the case of capital crimes. The dominion covenant imposes a moral obligation on all men to labor to subdue the earth to the glory of God. A man whose body has been deliberately mutilated probably will become a less productive worker. He may find it difficult to earn enough wealth to repay his debt to the victim. By cutting off the pickpocket's hand, the state is saying that there is no effective regeneration in life, that God cannot restore to wholeness a sinner's soul and his calling. Because he is a convicted pickpocket, he must be assumed to be a perpetual thief by nature; therefore, the state must make his future labor in his illegal calling less efficient. His hand is not being cut off because his victim lost a hand; it is being cut off simply as *an assertion of state power*, and as a deterrent against crime.

Boecker correctly observed that "The intention of the talion was not, therefore, to *inflict* injury—as it might sound to us today—but to *limit* injury."[40] But then he got everything confused once again. He said that this law restrained the institution of blood revenge.[41] He never bothered to apply this principle of restraint to the modern state. The Bible teaches that excessive penalties imposed by the state violate a fundamental principle of biblical obedience, both personal and civil: "Ye shall observe to do therefore as the Lord your God hath commanded you:ye shall not turn aside to the right hand or to the left" (Deut. 5:32). Conclusion: neither is the state to *cut off* the pickpocket's right hand or his left.[42]

2. The Punishment Should Benefit the Victim

Societies that are not governed by biblical law do not place the proper emphasis on the principle of economic restitution. The concern of the judicial system becomes *punishment of the criminal* rather than *restitution to the victim*. W. Cleon Skousen, a lawyer and former law enforcement official, described the prevailing situation: "Under modern law, fines are almost invariably paid to the city, county or

make full restitution, adding one fifth to it." The New American Standard reads: "[H]e shall make restitution for it in full, and add to it one-fifth more." The restitution payment would appear to be the penalty payment equal to the item stolen.

40. Boecker, *Law and the Administration of Justice*, p. 174.

41. *Ibid.*, pp. 174–75.

42. The Hammurabi Code specified death for any thief who had taken an oath that he had not stolen: CH, paragraphs 9–10. There was a 30-fold restitution for stealing animals belonging to the state: paragraph 8. *Ancient Near Eastern Texts*, p. 166.

federal government. If the victim wants any remedy he must sue for damages in a civil court. However, as everyone knows, by the time a criminal has paid his fines to the court, he is usually depleted of funds or consigned to prison where he is earning nothing and therefore could not pay damages even if his victim went to the expense of filing a suit and getting a judgment. As a result, modern justice penalizes the offender, but does virtually nothing for the victim."[43] In later stages of the development of humanism, state officials begin to substitute the shibboleth of "rehabilitation" for punishment, although the form this "rehabilitation" takes makes the state's officers even more arbitrary than before.

Biblical law restrains the arbitrariness of the state's officers. If the punishment must fit the crime, then the judges do not have the authority to impose lighter judgments or heavier judgments on the criminal. The victim decides the penalty, not the judges.[44] The criminal is to be given sufficient freedom to repay the victim, even if he must be sold into indentured servitude for a specific period of time in order to raise sufficient funds to pay off the victim. As a servant, he learns the discipline of work, and perhaps sufficient skills to give him a new calling and a new life when his debt is paid. But the debt is always to a private party: to the victim originally, and the slave-owner secondarily. Where a specific victim is involved and can be identified, the debt is not owed as a fine to the state. It is owed to the victim. The man who causes a premature birth in which the baby is not harmed nevertheless pays a fine to the family because of the risk to which he subjected the pregnant woman and her child.

3. Fines Should Compensate Victims

This should not be understood as an argument against fines to the civil government for so-called "victimless crimes." For example, a person is prohibited from driving a car at 70 miles an hour through a residential district or school zone. There are potential victims who deserve legal protection. The speeding driver is subjecting them to added risk of injury or death. Clearly, it is more dangerous statistically for children to attend a school located near an unfenced street

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43. W. Cleon Skousen, *The Third Thousand Years* (Salt Lake City, Utah:Bookcraft, 1964), p. 354. Skousen served in the Federal Bureau of Investigation (FBI) for 16 years and also served as Chief of Police in Salt Lake City in 1956. He became Editorial Director of *Law and Order* in 1960, the leading professional law enforcement journal in the United States.

44. Chapter 33.

on which drivers are travelling at 70 miles an hour rather than 25. The imposition of a fine helps to reduce the number of speeding drivers. Because they increase risks to families, drivers who exceed the speed limit can legitimately be fined, because the victims of this increased statistical risk cannot be specified. These fines should be imposed locally: to be used to indemnify future local victims of crimes that go unpunished.

The state is not to use fines to increase its operating budget or increase its control over the lives of innocent citizens. The state is to be supported by tax levies, so that no conflict of interest should occur between honest judgment and the desire to increase the state's budget. The proper use of fines is the establishment of a *restitution fund for victims of crimes whose perpetrators cannot be located or convicted*, analogous to the Old Testament sacrifice of the heifer when a murderer could not be found (Deut. 21:1–9). Such a fund is a valid use of the civil law. Even if law enforcement authorities are unable to locate and convict a criminal, the victim still deserves restitution, just as God deserved restitution for an unsolved murder in Israel in the form of a sacrificed heifer. A reasonable way of funding such a restitution program is to collect money from those who have been successfully convicted by law enforcement authorities.

E. Hayek's Three Principles

Lex talionis binds the state. This so-called "primitive" principle keeps the state from becoming arbitrary in its imposition of penalties. *Citizens can better predict in advance what the penalty will be for a specific crime*. This is extremely important for maintaining a free society. The three legal foundations for a free society, Hayek argued, are known general rules, certainty of enforcement, and equality before the law. I argue that the principle of "eye for eye" preserves all three.

1. General Rules

First, with respect to general rules, Hayek wrote that these rules must distinguish private spheres of action from public spheres, which is crucial in maintaining freedom: "What distinguishes a free from an unfree society is that in the former each individual has a recognized private sphere clearly distinct from the public sphere, and the private individual cannot be ordered about but is expected to obey only the rules which are equally applicable to all. It used to be the boast of free men that, so long as they kept within the bounds of the known law,

there was no need to ask anybody's permission or to obey anybody's orders. It is doubtful whether any of us can make this claim today."[45] If men must ask permission before they act, society then becomes a *top-down bureaucratic order*, which is an appropriate structure only for the military and the police force (the "sword").[46] The Bible specifies that the proper hierarchical structure in a biblical covenant is a bottom-up appeals court structure (Ex. 18).[47]

Adam was allowed to do anything he wanted to do in the garden, with only one exception. He had to avoid touching or eating the forbidden fruit. He did not have to ask permission to do anything else. He was free to choose.[48] This biblical principle of legal freedom is to govern all our decisions.[49] This is stated clearly in Jesus' parable of the laborers who all received the same wage. Those who had worked all day complained to the owner of the field. The owner responded: "Friend, I do thee no wrong: didst not thou agree with me for a penny? Take that thine is, and go thy way: I will give unto this last, even as unto thee. Is it not lawful for me to do what I will with mine own? Is thine eye evil, because I am good?" (Matt. 20:13–15).[50] Neither the owner nor the workers had to get permission in advance from some government agency. God leaves both sides free to choose the terms of labor and payment.

Because God alone is omniscient, He controls the world perfectly. Men, not being omniscient, must accept judicial restrictions on their own legitimate spheres of action. In doing so, they acknowledge their position as creatures under God. They must face the reality of their own limitations as creatures. They must not pretend that they can foresee the complex outcome of every activity of every person in society. The complexity of life is too great. Men can only make guesses about the consequences of human action. *To bring the greatest quantity of accurate knowledge to bear on society at any point in time, men must*

45. F. A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), ch. 14:2.

46. Ludwig von Mises, *Bureaucracy* (New Haven, Connecticut: Yale University Press, 1944), ch. 2.

47. Ray R. Sutton, *That You May Prosper: Dominion By Covenant*, 2nd ed. (Tyler, Texas: Institute for Christian Economics, [1987] 1992), ch. 2.

48. Milton and Rose Friedman, *Free to Choose: A Personal Statement* (New York: Harcourt Brace Jovanovich, 1980).

49. Grace Hopper, who developed the computer language Cobol, and who served as an officer in the U.S. Navy until she was well into her seventies, offered this theory of leadership: "It's easier to say you're sorry than it is to ask permission."

50. Gary North, *Priorities and Dominion: An Economic Commentary on Matthew*, 2nd ed. (Dallas, Georgia: Point Five Press, [2000] 2012), ch. 40.

be allowed great latitude in their personal decision-making. This division of intellectual labor is what provides society with the best available knowledge at a price people are willing to pay.[51] If men pretend that a committee of experts can plan for an entire economy, they have denied God's exclusive omnipotence and omniscience. Hayek was correct: "...the demand for conscious control is therefore equivalent to the demand for control by a single mind."[52] He went on to argue: "Indeed, any social processes which deserve to be called 'social' in distinction from the action of individuals are almost *ex definitione* not conscious. Insofar as such processes are capable of producing a useful order which could not have been produced by conscious direction, any attempt to make them subject to such direction would necessarily mean that we restrict what social activity can achieve to the inferior capacity of the individual mind."[53] Worse; in a socialist society, we restrict what social activity can achieve to what a responsibility-avoiding, government-protected committee can achieve.

By decentralizing decision-making within a system of known rules, and by allowing a competitive system of market-imposed rewards and punishments, society preserves individual freedom, individual and corporate productivity, and personal responsibility. This decentralized decision-making process is what is established by the profit management system.[54]

The principle of "eye for eye" is easily understood. It allows people to evaluate in advance their potential liabilities for actions that inflict physical harm on others. This encourages personal responsibility. It also encourages people to make accurate assessments of potential costs and benefits of their actions. This is the biblical principle of *counting the cost* (Luke 14:28–30).[55] It is basic to biblical liberty that individuals count the costs of their behavior.

2. Legal Predictability

Second, there is the crucial issue of legal predictability. "There is probably no single factor which has contributed more to the pros-

51. F. A. Hayek, *Individualism and Economic Order* (Chicago: University of Chicago Press, 1948), ch. 4.

52. F. A. Hayek, *The Counter-Revolution in Science: Studies of the Abuse of Reason* (Indianapolis, Indiana: Liberty Press, [1952] 1979), p. 153.

53. *Ibid*., p. 154

54. Mises, *Bureaucracy*, ch. 1.

55. Gary North, *Treasure and Dominion: An Economic Commentary on Luke*, 2nd ed. (Dallas, Georgia: Point Five Press, [2000] 2012), ch. 35.

perity of the West than the relative certainty of the law which has prevailed here."[56] He made a very important point in this regard. The certainty of law is important, not just in cases that come before the courts, but also in those cases that do not lead to formal litigation because the outcome is so certain. "It is the cases that never come before the courts, not those that do, that are the measure of the certainty of the law."[57] In the United States, there is seemingly endless litigation, precisely because of the unpredictability of the courts.[58] Men go into the courts seeking justice because they do not know what to expect from the courts. If they knew what to expect, fewer people would bother to litigate. They would settle out of court or perhaps even avoid the original infraction.

The law of God establishes the "eye for eye" principle. Men can assess, in advance, what their punishment is likely to be if they transgress the law. They can count the potential cost of violence. This is a restraining factor on all sin. A person can imagine the costs to his potential victim of losing an eye or a tooth. If convicted, the criminal will bear a comparable cost.

Rulers ought to be aware that the *lex talionis* principle is not simply limited to crimes by private citizens. Judgments fall on nations, both blessings and cursings (Judges, Jonah, Lamentations). The list of promised *national* cursings in Deuteronomy 28:15–68 is a detailed extension of the list of promised blessings in verses 1–14. When nations defy God in specific ways, they will be judged in specific ways—mirror images of the promised blessings to covenantally faithful nations. Instead of going out in war (a national endeavor, not private) and scattering their enemies, they will go out to war and be scattered by their enemies. Instead of lending to their enemies, they will become debtors to their enemies. The principle of "eye for eye" is essential to all of life. From him to whom much has been given, much is expected (Luke 12:47–48).[59]

3. Equality Before the Law

"The third requirement of true law is equality."[60] Equality before the law, as W. F. Albright wrote, is reinforced by the "eye for eye"

56. Hayek, *Constitution of Liberty*, ch. 14:3.
57. *Idem*.
58. Macklin Fleming, *The Price of Perfect Justice* (New York: Basic Books, 1974).
59. North, *Treasure and Dominion*, ch. 28.
60. Hayek, *Constitution of Liberty*, ch. 14:4.

principle.[61] The rich man, as well as the poor man, wants to avoid the loss of an eye or a tooth. Therefore, the rich man, like the poor man, must avoid inflicting such injuries on other people. There must be equality before the law (Lev. 19:15).[62] The judges must not impose a tooth's worth of punishment for an eye's worth of damage just because the convicted person is rich or famous. People can then trust the law and the courts, for they know that the law is being enforced because God is sovereign over the affairs of men. The law does not become a weapon of oppression to be used by one class over another. The law, to use Marx's terminology, is not to become a superstructure which is built on the foundation of an economic substructure. The law of God is the substructure in terms of which the economy, the political order, and the pattern of society develop.

Thus, the general legal principle of "eye for eye" in the imposition of civil punishments is a crucial foundation of human freedom, for it binds the civil government in advance. Hayek's discussion is very useful for understanding the state-binding purposes of the *lex talionis*. There are three legal principles that undergird a free society, he argues: general legal rules that (1) distinguish private from public spheres of action; (2) provide legal predictability; and (3) provide equality before the law. The judicial principle of *lex talionis* supports all three.

F. Restoration, Repentance, and Restitution

Men have failed to understand the fundamental goal of biblical law: *restoration*—restoration of the covenantal relation between God and a formerly rebellious man, and restitution between the criminal and his victim. Rushdoony wrote: "Emphatically, in Biblical law the goal is *not punishment but restoration*, not the infliction of certain penalties on criminals but the restoration of godly order."[63] The criminal is to make restitution to the victim. This restores the victim's position prior to the crime, plus it increases his holdings to compensate him for the trouble the crime caused him. He is as fully repaid as the court system can lawfully determine. The innocent members of society can feel more confident about their lives and property because

61. "So the lex talionis (is)...the principle of equal justice for all!" W. F. Albright, *History, Archeology, and Christian Humanism*, p. 74, as cited in Shalom Paul, *Studies in the Book of the Covenant*, op. cit., p.77.

62. Gary North, *Boundaries and Dominion: An Economic Commentary on Leviticus*, 2nd ed. (Dallas, Georgia: Point Five Press, [1994] 2012), ch. 14.

63. Rushdoony, *Institutes*, p.515.

the state is obeying God and punishing criminals in a way that preserves the dominion covenant. They can work hard, knowing that the state is working to reduce crime and help them keep the fruits of their labor. At the same time, the criminal now knows that his debt is paid, and that *the burden of guilt is removed*. He can then return to a lawful calling and begin to exercise dominion as a free man. This is what Rushdoony meant when he spoke of restoration, of maintaining godly order.

The Bible teaches restitution, repentance, and restoration. The criminal must make outward restitution to the victim, no matter what his feelings are. The state lawfully enforces this. Second, he is morally required by God to repent, and to declare himself at the mercy of God. No human government can lawfully enforce this. Finally, in response to both external restitution and internal repentance, God restores the sinner to wholeness.

The state cannot legitimately require the internal act of repentance; officers cannot know the criminal's heart. The state cannot legitimately require a public statement of theological faith from all residents in a society. The "stranger within the gates" may believe what he wants about God, man, and law.[64] The state can legitimately claim only the right to compel outward conformity to the law, including the law of economic restitution. *Outward conformity to the law* is sufficient to create the conditions of *external social order*. This is the function of civil government:*the preservation of external social order through the administration of justice*. At the same time, we must recognize that apart from widespread inward repentance, no social order can be preserved in the long run, for men will chafe at the requirements of God's law, including the law of restitution. Men will not honor God's law indefinitely, apart from widespread conversions. *Regeneration ultimately undergirds long-term social order*.[65] Nevertheless, it is not the state's function to seek to enforce inward regeneration. The state is not the Holy Spirit.

64. This does not mean that the state cannot legitimately require a statement of faith from those who seek citizenship, and therefore the right potentially to serve as judges "within the gates." In the United States, citizens are required to uphold and defend the Constitution; resident aliens make no such profession of faith. They are required to obey the terms of laws that are based on the Constitution, but they are not required by law to swear that they will uphold and defend it. This is one reason why foreign citizens should be exempt from military conscription:soldiers, as covenanted officials of the national government, are required to uphold and defend the Constitution. They wear the marks of their civil office (uniforms) and carry "swords": weapons.

65. Gary North, *Dominion and Common Grace: The Biblical Basis of Progress* (Tyler, Texas: Institute for Christian Economics, 1987), ch. 6.

1. Concern for the Victim

Concern for the victim rather than with rehabilitation of the criminal often marked so-called "primitive" societies. English common law has also tended to focus on retribution, not the rehabilitation of the criminal. It seeks to punish men in specific ways for specific evil acts. In contrast, modern humanistic theories of jurisprudence, in the name of humanitarianism, to a great extent have promoted a messianic view of the state. Lon Fuller summarized the contrasting views, and the heart of the controversy is the assertion of the ability of the state to *recreate* man: "The familiar penal or retributive theory looks to the act and seeks to make the miscreant pay for his misdeed; the rehabilitative theory on the other hand, sees the purpose of the law as recreating the person, or improving the criminal himself so that any impulses toward misconduct will be eliminated or brought under internal control. Despite the humane appeal of the rehabilitative theory, the actual processes of criminal trials remain under the domination of the view that we must try the act, not the man; any departure from this conception, it is feared, would sacrifice justice to a policy of paternalistic intervention in the life of the individual."[66] This fear is well-deserved: continual interventions into the lives of men by a self-professed omniscient paternalistic state is exactly where a legal theory of "trying the man rather than his acts" does lead. A jury can make the criminal "pay for his crime" by paying the victim because members of the jury can make reasonable estimates of the economic effects of the convicted criminal's acts. On the other hand, jurors cannot read the convicted criminal's mind. When judges try to read other men's minds, the result is tyranny.

Restitution by the criminal to the victim is one way of restoring wholeness to the victim. It also reduces the likelihood of private attempts at vengeance.[67] It is a way of dealing with guilt. In this sense, it is a means of restoring wholeness to the criminal, too.

Israel's history can legitimately be classified in terms of a series of incidents by which this three-fold relationship—repentance, restitution, and restoration—was illustrated in a covenantal, communal, and national way. Israel's deliverance from Babylon is a good exam-

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66. Lon Fuller (1969), cited by Richard E. Laster, "Criminal Restitution: A Survey of Its Past History and an Analysis of Its Present Usefulness," *University of Richmond Law Review*, V (1970), p. 97. Laster's study concluded that the role of the victim in criminal law has steadily diminished (p. 97).

67. Laster, *ibid*., p. 75.

ple of this restorative process. It is also illustrated in the instance of David's adultery and his murder of Uriah the Hittite. David repented (II Sam. 12:13); the child died (12:18), and so did three of his adult sons—Amnon, Absalom, and Adonijah—thereby making four-fold restitution on a "four lives for one" basis.[68] Four-fold restitution was the required payment for the slaughter of a lamb (Ex. 22:1). Nathan the prophet had used the analogy of the slaughtered ewe lamb in his confrontation with David (II Sam. 12:4). David recognized that the culprit was worthy of death (v. 5). David therefore could not escape making the four-fold restitution payment to God's sense of justice (adultery and murder are both capital crimes in the Bible). Subsequently, David and Bathsheba were covenantally restored in their marriage, which God testified to publicly by the birth of Solomon (12:24), who became the lawful heir of David's throne.

We must understand capital punishment as God's required restitution payment. The death penalty is not a means of revenge alone or deterrence alone. It was imposed on Adam and his heirs, and also on the second Adam, Jesus Christ. For any civil crime too great to be compensated for by a monetary restitution payment to the victim, God requires the civil magistrate to impose the death penalty, God's restitution payment. Homicide, for example, could not be paid for in Israel by anything less rigorous than life for life (Num. 35:31), a law which is without parallel in the laws of the ancient Near East.[69] Later rabbinic Judaism abandoned the principle that all murderers are subject to the death penalty, in order to reduce the penalty for Jews who kill resident aliens or gentiles. Maimonides was quite open about this: "If an Israelite kills a resident alien, he does not suffer capital punishment at the hands of the court, because Scripture says, *And if a man come presumptuously upon his neighbor* (Exod. 21:12). Needless to say, one is not put to death if he kills a heathen."[70]

Restitution, repentance, and restoration are equally fundamental concepts in Christian theology. Without Christ's restitution payment to God for the sins of mankind, there could have been no history from the day Adam fell. Without repentance, the individual cannot claim to be free from the requirement to make the restitution payment to God. Eternal judgment is God's lawful vengeance on all

68. Herbert Chanan Brichto, "Kin, Cult, Land and Afterlife–A Biblical Complex," *Hebrew Union College Annual*, XLIV (1973), p. 42.

69. Paul, *Book of the Covenant*, p. 61.

70. Moses Maimonides, *The Book of Torts*, vol. 11, *The Code of Mainonides*, 14 vols (New Haven, Connecticut: Yale University Press, [1180] 1954), V:II:11, p. 201.

those who have not made restitution, meaning all those who have not placed themselves at the mercy of God by claiming to be under Christ's general repayment. The absolute righteousness of God is demonstrated by His eternal punishment of those who have not made full restitution to Him. The punishment fits the crime of ethical rebellion against a sovereign, holy God.

2. Restitution in Practice

Various forms of restitution have been adopted by civil governments for centuries.[71] Experiments by state and local governments in the United States since the mid-1970s also indicated that such a system can provide significant benefits to victims. The state of Minnesota began its experiment in October of 1973. Based on one year's data, researchers made a study of opinions and results. Restitution was a condition of probation of the criminals in one-fourth of all probation cases. "Restitution was used in a straightforward manner by most courts. Full cash restitution was ordered to be paid by the offender to the victim in more than nine out of ten cases. Adjustments in the amount of restitution because of limited ability of the offender were rare. In-kind, or service, restitution to the victim or community was ordered in only a few cases. . . ."[72]

The program was limited primarily to non-violent criminal offenders who were considered able to pay, which generally meant white middle-class criminal offenders.[73] This limits the empirical reliability of the conclusions concerning the overall effectiveness of the program. Also, the amount of restitution was limited to the amount of the economic loss by the victims, not two-fold restitution, as required by the Bible. The original state-level trial program was dropped in 1976, but the principle has been instituted at the local level. Judges in every jurisdiction now impose restitution as a penal sanction.

The *Summary Report* stated that "Most judges and probation officers favored the use of restitution. Similarly most judges and probation officers expressed the belief that restitution had a rehabilitative effect." Furthermore, "most victims believed that restitution by the offender to the victim is the proper method of victim compensation.

71. J. A. Gylys and F. Reidy, "The Case for Compensating Victims of Crime," *Atlanta Economic Review*, XXV (May/June 1975).

72. *Summary Report: The Assessment of Restitution in the Minnesota Probation Services*, prepared for the Governor's Commission on Crime Prevention and Control (Jan. 31, 1976), p. 1.

73. *Idem*.

Victims who were dissatisfied tended to be those who felt that they had not been involved in the process of ordering or aiding in the completion of restitution." And perhaps most revealing of all, "Most offenders thought that restitution as ordered was fair."[74] Only ten of the offenders (14.4%) would have preferred a fine or a jail sentence.[75] It is understandable why we have seen a renewed interest in restitution as a form of punishment.[76]

G. Prisons

The prison as a correctional and rehabilitative institution was the invention of the early nineteenth-century reform movement in the United States. Visitors from all over Europe came to see these correctional "wonders." The most famous of these visitors was Alexis de Tocqueville, who came from France in 1831 to see our prisons, and who then wrote the most insightful study of American institutions in the nineteenth century, which also became the earliest major work in the discipline of sociology, *Democracy in America* (1835, 1840). He and his colleague Gustave de Beaumont produced a report on their observations, *On the Penitentiary System in the United States* (1833).[77] Parallel tax-supported institutions were developed during this same era: the insane asylum, the orphanage, the reformatory for youthful delinquents, and the large-scale public almshouse.[78] It was also the

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74. *Idem*.

75. *Ibid*., p.26.

76. Joe Hudson and Burt Galloway (eds.), *Considering the Victim: Readings in Restitution and Victim Compensation* (Springfield, Illinois: Charles C. Thomas, 1975); O. Hobart Mowrer, "Loss and Recovery of Community," in George M. Gazda (ed.), *Innovations to Group Psychotherapy* (Springfield, Illinois: Charles C. Thomas, 1975). Such interest has never been entirely absent: see Irving E. Cohen, "The Integration of Restitution in the Probation Services," *Journal of Criminal Law, Criminology and Police Science*, XXXIV (1944), pp.315–26.

77. *Tocqueville and Beaumont on Social Reform*, ed. Seymour Drescher (Santa Fe, New Mexico: Gannon, 1968).

78. David Rothman wrote: "Americans in the colonial period had followed very different procedures. They relieved the poor at home or with relatives or neighbors; they did not remove them to almshouses. They fined or whipped criminals or put them in stocks or, if the crime was serious enough, hung them; they did not conceive of imprisoning them for specific periods of time. The colonists left the insane in the care of their families, supporting them, in case of need, as one of the poor. They did not erect special buildings for incarcerating the mentally ill. Similarly, homeless children lived with neighbors, not in orphan asylums.... The few institutions that existed in the eighteenth century were clearly places of last resort. Americans in the Jacksonian period reversed these practices. Institutions became places of first resort, the preferred solution to the problems of poverty, crime, delinquency, and insanity." David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Boston: Little, Brown, 1971), p. xiii.

era of the first "religiously neutral" (humanistic) tax-supported day schools in the United States.[79]

1. No Prisons

In Israel, there was no prison system. Egypt had prisons; Israel did not.[80] Why not? Because prisons do not offer adequate opportunities for criminals to repay their victims. *A prison restricts the criminal's ability to make restitution, and restitution is the very essence of biblical punishment*. Prisons restrict men's ability to repay; they also make it difficult for men to exercise dominion over nature.

In a sense, the prison is analogous to the final judgment. There is no restitution to victims by those in hell or in the lake of fire. There is permanent restitution to God, but not to man. In this sense, hell is outside history and the process of restitution and restoration. Hell is described as a debtors prison in Jesus' parable of the unjust debtor. The debtor is cast into prison until every last payment is made (Matt. 18:23–35).[81] The debtor could get out only if someone else paid his obligations. Clearly, this is a picture of Christ's payment of His people's ethical debts to God, as their kinsman-redeemer. This substitute payment is available to mankind only in history. Thus, the prison is illegitimate because it represents a denial of history and its opportunities. That Egypt had prisons is understandable; Egyptians had a static view of time. Israel did not. Old Testament law did not allow imprisonment.[82]

Western Europe abandoned debtors prison during the decade 1867–77.[83] Legislators at last recognized that it did victims no good to see a debtor cast into prison until he paid, because he could not earn his way out. It is not coincidental that Europe passed such legislation in the same era that the United States and Russia abolished slavery, another system that also did not provide a way for people to buy their way out.

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79. The two leaders in this self-consciously anti-Christian public school movement were Horace Mann and James G. Carter: R. J. Rushdoony, *The Messianic Character of American Education: Studies in the History of the Philosophy of Education* (Nutley, New Jersey: Craig Press, 1963), chaps. 3, 4.

80. Rushdoony, *Institutes*, pp. 514–16.

81. North, *Priorities and Dominio*n, ch. 37.

82. Samson Raphael Hirsch, *The Pentateuch Translated and Explained*, trans. Isaac Levy, 5 vols., *Exodus*, 3rd ed. (London: Honig & Sons, [1860s?]1967), p. 294: at Exodus 21:6.

83. France abolished debtors prison in 1867; England abolished it by the Debtors Act of 1869. Ireland followed in 1872, Scotland in 1880. Switzerland and Norway abolished it in 1874, Italy in 1877. "Debt," *Encyclopaedia Britannica*, 11th ed. (New York: Encyclopaedia Britannica, Inc., 1910), VII, p. 906.

The ultimate earthly prison is the concentration camp. While the Soviet camp system had economic functions, the cruelty of long sentences was obvious. Under Stalin, these sentences were incredibly grotesque. As many as 30 million people were sent into the camps, never to return.[84] The magnitude of the crime against humanity seems irrationally cruel.[85] They were irrational, according to Solzhenitsyn. The first thought of the arrested person was always, "Me? What for?"[86] From 1934 on, a soldier captured in wartime was automatically given a 10-year sentence upon being freed from the enemy.[87] Encircled military units got 10-year sentences after 1941.[88] Failure to denounce specified evil acts carried an indeterminate sentence.[89] Quotas for arrests made the diversity of the camps fantastic, he said; there was no logic to them.[90] A chance meeting with a condemned man could get you 10 years.[91] Owning a radio tube was worth 10 years.[92] In 1948, the average sentence increased to 25 years; juveniles received 10.[93]

The classic story he told was of a district Party conference in Moscow Province. At the end of the conference, someone called for a tribute to Stalin. A wave of applause began, and continued. Everyone was afraid to be the first person to stop clapping, for fear of being arrested. It went on for 11 minutes. Finally, one man, a factory director, stopped clapping and sat down, then the whole group immediately stopped and sat down. That night the man was arrested, and he then received a 10-year sentence.[94]

There is only one way to explain this: *the desire of the state to become God and to impose hell on earth*. It became a goal of state policy to destroy men's lives, to leave them without earthly hope in the future. It was easy to go to jail without a trial. The Special Boards attached to the secret police, the OSO's,[95] handed down "administrative penalties," not sentences. "The OSO enjoyed another important advantage

84. Robert Conquest, *The Great Terror: Stalin's Purges of the Thirties*, rev. ed. (New York: Collier, 1973), p. 710.

85. Van den Haag, *Punishing Criminals*, p. 43.

86. Aleksandr Solzhenitsyn, *The Gulag Archipelago, 1918–1956: An Experiment in Literary Investigation, I–II* (New York: Harper & Row, 1974), p. 4.

87. *Ibid.*, p. 61.

88. *Ibid.*, p. 79.

89. *Ibid.*, pp. 67, 363.

90. *Ibid.*, p. 71.

91. *Ibid.*, p. 75.

92. *Ibid.*, p. 78.

93. *Ibid.*, p. 91.

94. *Ibid.*, pp. 69–70.

95. *Ibid.*, p. 275.

in that its penalty could not be appealed. There was nowhere to appeal to. There was no appeals jurisdiction above it, and no jurisdiction beneath it. It was subordinate only to the Minister of Internal Affairs, to Stalin, and to Satan."[96] It is not surprising that the camps became the closest thing in recorded history to hell on earth.

2. Bureaucracy

The prison is a bureaucracy, not a market-oriented institution. It is run by the state through taxes. It is a bureaucratic management system, not a profit management system.[97] Men are trained to follow orders, not to innovate, take risks, and meet market demand. There are many arguments against prisons, as revealed by an enormous bibliography on alternatives to prisons,[98] but the most important one is that they thwart the biblical principle of restitution.

The prison also creates other horrors, such as homosexuality and training in criminal behavior for the younger inmates by the "skilled" older inmates. It puts too much power in the hands of prisoners, who can commit rape and even murder with their AIDS infections.[99] It puts too much power in the hands of guards, who can then indulge their tastes in brutality. It puts too much power in the hands of parole boards, who can shorten a man's sentence irrespective of the crime, thereby making the punishment fit the board's assessment of the criminal, not the judge's assessment of the effects of the crime—or more to the point, making the punishment fit the latest humanistic theory of criminal behavior and social responsibility, not the crime.[100]

Left-wing humanists have begun to see the threat to justice posed

96. *Ibid*., p. 285.

97. See Gary North, "Statist Bureaucracy in the Modern Economy," in North, *An Introduction to Christian Economics* (Nutley, New Jersey: Craig Press, 1973), ch. 20. See also Mises, *Bureaucracy*.

98. James R. Brantley and Marjorie Kravitz (eds.), *Alternatives to Institutionalization: A Definitive Bibliography*, published by the National Criminal Justice Reference Service of the National Institute of Law Enforcement and Criminal Justice, a division of the Law Enforcement Assistance Administration, U.S. Department of Justice (May 1979), 240 pages.

99. National columnist Mike Royko recommended prison sentences rather than fines for computer hackers, because intelligent middle-class prisoners will be raped in jail. "If the computer vandals are as bright as they think they are, they'll decide that they don't want to be forcibly betrothed to some hulk of a cellmate with a shaved head and 10 tattoos." Mike Royko, "No software in his heart for hackers," *Washington Times* (Nov. 11, 1988). This is a politically conservative newspaper.

100. C. S. Lewis, "The Humanitarian Theory of Punishment," in Lewis, *God in the Dock: Essays on Theology and Ethics*, ed. Walter Hooper (Grand Rapids, Michigan: Eerdmans, 1972), pp. 287–300.

by the indeterminate sentence.[101] Mitford described the indeterminate sentence as "a potent psychological instrument for inmate manipulation and control, the 'uncertainty' ever nagging at the prisoner's mind a far more effective weapon than the cruder ones then [in the 1870s] in vogue:the club, the starvation regime, the iron shackle."[102] Because of doubts regarding the prison as a means of correcting evil behavior, we have seen an increasing resistance by juries and judges to send first offenders or minor offenders to prison. But because restitution has not yet become a common means of punishing criminals, these "minor" criminals receive no punishment, other than having to report occasionally to an overburdened probation or parole officer.[103]

These same humanists look at the "eye for eye" principle, and react in horror. They did not react with equal consternation when they confronted the problem of the late twentieth century's increase in violent crime. At the end of an age, we expect to see an increase in criminal behavior, as lawlessness becomes a way of life for a dedicated, pathological minority, while religious and cultural relativism and self-doubt render citizens and their elected authorities helpless to stem this tide of consistent lawlessness. Gilbert Murray, the great student of Greek civilization, characterized the last days of Greek religion as "the failure of nerve."[104] This seems to fit contemporary Western humanism quite well.

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101. Jessica Mitford, *Kind and Usual Punishment: The Prison Business* (New York: Knopf, 1973), ch.6. Those who have opposed capital punishment have denounced it as cruel and unusual. Mitford's attack implies that imprisonment is, too. What, then, is legitimate punishment? The Bible gives us guidelines; few humanists do.

102. *Ibid*., p. 82.

103. Charles Manson, who led the "family" (cult) of murderers who killed actress Sharon Tate and several others in 1969, was on parole from prison at the time. Others in his "family" were also on probation. As the prosecuting attorney later wrote: "Manson associated with ex-cons, known narcotics users, and minor girls. He failed to report his whereabouts, made few attempts to obtain employment, repeatedly lied regarding his activities. During the first six months of 1969 alone, he had been charged, among other things, with grand theft auto, narcotics possession, rape, contributing to the delinquency of a minor. There was more than ample reason for parole revocation." Vincent Bugliosi, *Helter Skelter: The True Story of the Manson Murders* (New York: Norton, 1974), p. 420. Manson's parole officer stated in court that he could not remember whether Manson had been on probation or parole; the man was responsible for overseeing 150 persons (p. 419). Manson had actually begged to be allowed to remain in jail when they released him in 1967; at that time, he was 32 years old, and had spent 17 years in penal and reform institutions (p. 146).

104. Gilbert Murray, *Five Stages of Greek Religion* (1925 edition), reprinted by AMS Press and Greenwood Press.

3. Emptying Prisons and Stoning Sons

Prisons need to be emptied. The biblical way to accomplish this is to revive the biblical practices of execution for habitual criminals (Deut. 21:18–21), corporal punishment (Deut. 25:1–3), and restitution. It is interesting that the justification for executing habitual criminals rests on that bugaboo of all pietism, the execution of the rebellious son. It is a case of "if *this*, then how much more *that*." If it is mandatory that a man bring his incorrigible adult son before the elders for gluttony, drunkenness,[105] and verbal rebellion, how much more ready will a society be to execute repeatedly violent individuals or members of a professional criminal class! Remove from the law books the law regarding the civic execution of the rebellious son, and you thereby remove the one *and only* biblical sanction for executing professional criminals. The "three-time loser" penalty of American jurisprudence[106] has disappeared; in its place has come a criminal class of far more than three felony convictions—and most of these professionals are paroled early.

Incorrigible sons and incorrigible criminals are to be removed from society: ". . . so shalt thou put evil away from among you; and all Israel shall hear, and fear" (Deut. 21:21b). Rushdoony identified the importance of this law for society: "Such persons were thus blotted out of the commonwealth. When and if this law is observed, ungodly families who are given to lawlessness are denied a place in the nation. The law thus clearly works to eliminate all but the godly families."[107] The point here is that if incorrigible sons are to be executed, how much more the members of the professional criminal class. The case law is based on the idea that this maximum sanction, if applied to a seemingly minimal infraction, is surely to be applied in an analogous major infraction. The infraction is repeated lawlessness as a lifestyle: *incorrigibility*.

The prison is a second-best device. It does keep some habitual criminals locked up for part of their lives. It is sometimes argued that by keeping them out of circulation, the overall crime rate drops. There is only spotty evidence to prove this. The problem is, when one criminal is locked up, others move into the "vacuum" of crime.[108] It may take time for the new entrants to become equally skilled, however.

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105. Seven-year-olds are not drunkards; this verse deals with adult rebels.

106. A man convicted of a felony for the third time used to receive life imprisonment without possibility of parole.

107. Rushdoony, *Institutes*, p. 380.

108. Van den Haag, *Punishing Criminals*, pp. 53–60.

Still, prison is a threat. If a society refuses to execute professional criminals, then it must impose some kind of sanctions if evil is not to be indirectly subsidized. Biblical law is a package deal. It will not suffice to empty the prisons until the whole of biblical criminal law is on the law books and enforced, especially the death penalty against rebellious sons. Those who are appalled by this law are not sufficiently appalled by professional criminal behavior.

Conclusion

The biblical principle of an eye for an eye protects society from a lawless state that recognizes no limitations on its power. This law establishes the fundamental judicial principle that the punishment should fit the crime. This principle, sometimes called *lex talionis*, requires that the criminal *pay back* to the victim whatever was stolen, and in some cases an additional penalty payment is required.

There is no doubt that this law is based on vengeance, but vengeance is a basic principle of biblical law. God extracts a vengeance payment from evil-doers: perfect vengeance at the day of judgment, and imperfect vengeance through the civil government. Vengeance is a form of restitution to God.

The fundamental goal of biblical law is *restoration*. Evil people are to be restored by God to righteousness. The state cannot save mankind, except in the sense of healing through enforcing justice, but it can impose external punishments that make social and economic restoration possible. Restitution by the criminal to the victim is an effective way of restoring wholeness to both parties. It upholds a basic principle of civil law: punishment should benefit the victim.

Prisons are a second-best system of punishment. They keep hardened criminals off the street, but they do very little for the past victims. While they should eventually be emptied, except for holding suspects for trial at the local level, this would be too risky before all three biblical sanctions are restored to civil law: the death penalty, corporal punishment, and economic restitution.

38

THE AUCTION FOR SUBSTITUTE SANCTIONS

If men strive, and hurt a woman with child, so that her fruit depart from her, and yet no mischief follow:he shall be surely punished, according as the woman's husband will lay upon him; and he shall pay as the judges determine. And if any mischief follow, then thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe.

EXODUS 21:22–25

As I stated in the previous chapter, the theocentric issue here is man as God's image. The victim represents God. God requires the civil government to impose a negative sanction on the convicted criminal because of his violation of the victim's rights. The judicial principle governing the sanction is "eye for eye."

Politically left-wing humanists have long ridiculed the legitimacy of this principle of governance. Is their concern about the supposed brutality shown by the Bible's "eye for eye" principle misguided? Shouldn't their concern be focused on the brutality of the criminal against the innocent victim? Is the *lex talionis* principle not a deterrent to crime, especially repeated crimes by a criminal class? Shouldn't our concern be with the victims of violent crime rather than with the criminals who commit them?

A. Thumb for Thumb, Eye for Eye

We read of Adoni-bezek in the first chapter of Judges. Adoni-bezek (Lord of Bezek) was a Canaanitic king. The Israelites fought him and defeated him. "But Adoni-bezek fled; and they pursued after him, and caught him, and cut off his thumbs and his great toes. And Adoni-bezek said, Threescore and ten kings, having their thumbs and

their great toes cut off, gathered their meat under my table: as I have done, so God hath requited me. And they brought him to Jerusalem, and there he died" (Jud. 1:6–7). This Canaanitic king's confession reveals that he recognized the justice of the punishment imposed on him by his conquerors.[1] He had cut off the toes and thumbs of kings; now he had suffered the same punishment. He had removed their anatomical "tools of dominion"; now he had his removed.[2]

This incident raises some difficult exegetical questions. Was the "eye for eye" principle literally applied in ancient Israel after the defeat of Canaan? Did Israel's courts really poke out people's teeth and eyes? If not, why not? Or is it merely that there are no clear-cut biblical records of such physical penalties being imposed by Israelite judges on Israelite citizens?

The incident also raises some difficult historical questions. In the Christian West, judges have consistently refused to impose "eye for eye" physical penalties. In non-Christian societies, permanent physical vengeance is quite common, e.g., Islam's *Shari'a* law. Why not in the West? What is it about inflicting permanent physical mutilation—in contrast to whippings or other relatively impermanent forms of physical violence—that so repels Westerners?

1. The West's Future-Orientation

The West's impulse toward dominion in history is one possible answer. The West has been future-oriented, as a direct result of its Christian eschatological heritage: *a faith in linear history*, with a God-created beginning, a God-sustaining providence, and a God-governed final judgment.[3] This vision of linear time made possible the development of modern science.[4] The future-orientation of the West, especially from the seventeenth century onward, and especially in Protestant societies, led to faith in long-term progress, including long-term

1. The Hammurabi Code specified mutilations on an "eye for eye" basis, paragraphs 196–201. *Ancient Near Eastern Texts Relating to the Old Testament*, ed. James B. Pritchard, 3rd ed. (Princeton, New Jersey: Princeton University Press, 1969), p. 175.

2. Without a thumb, a person cannot grasp a tool or weapon. Without a big toe, he cannot balance himself easily. See James B. Jordan, *Judges: God's War Against Humanism* (Tyler, Texas: Geneva Ministries, 1985), pp. 4–5.

3. Karl Löwith, *Meaning in History* (Chicago: University of Chicago Press, 1949), ch. 11: "The Biblical View of History."

4. Stanley Jaki, *The Road of Science and the Ways to God* (Chicago: University of Chicago Press, 1978), chaps. 1, 2; *Science and Creation: From eternal cycles to an oscillating universe* (Edinburgh and London: Scottish Academic Press, [1974] 1980); "The History of Science and the Idea of an Oscillating Universe," in Wolfgang Yourgrau and Allen D. Beck (eds.), *Cosmology, History, and Theology* (New York: Plenum Press, 1977).

economic growth.[5] Western people have understood the importance to the community of full production from all members. There is (or was) the psychological and social phenomenon called "the Protestant Ethic."[6] Begging, for example, has not been favored in Protestant nations. Idleness has been frowned upon. Therefore, the realization that physical punishment can permanently reduce the productivity of any citizen repels the Westerner. The Western judge asks: What happens to the criminal after he has "paid his debt"? Why should the criminal, his family, his future employers, and consumers be deprived of his full future productivity? Why should any man be hampered in working out his own salvation with fear and trembling (Phil. 2:12)?[7] Wouldn't permanent physical mutilation tend to impair his future employment, thereby luring him back into a life of crime? What if he should experience a moral transformation in the future? Western justice seems to recognize such problems, and so it has rejected physical mutilation as a legal sanction.

2. Figuratively Speaking?

Are we to interpret the "eye for eye" passage figuratively? Jesus said in the Sermon on the Mount, "If thy right eye offend thee, pluck it out, and cast it from thee. . . . And if thy right hand offend thee, cut it off, and cast it from thee" (Matt. 5:29a, 30a). We recognize that He spoke figuratively. He meant that the lusts of the flesh are so dangerous spiritually that even the loss of eye or hand is to be preferred. Therefore, avoid moral contamination; avoid lust (5:28). But the issue in Exodus 21:24–25 is that there has been physical injury inflicted on another person. The eye which the victim has lost is a literal eye. To interpret the "eye for eye" passage figuratively because Jesus interpreted "eye" figuratively in a very different context is not legitimate.

There is no doubt that the "thumb for thumb" penalty was literally applied to Adoni-bezek. He recognized the justice of the penalty. Permanent physical mutilation is legitimate when applied to one who has committed a crime that has produced the same mutilation in an-

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5. Gary North, "Medieval Economics in Puritan New England, 1630–1660," *Journal of Christian Reconstruction*, V (Winter 1978–79), pp. 157–60.

6. Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (New York: Scribner's, [1904–5] 1958). See also Gary North, "The 'Protestant Ethic' Hypothesis," *Journal of Christian Reconstruction*, III (Summer 1976); Daniel T. Rodgers, *The Work Ethic in Industrial America, 1850–1920* (Chicago: University of Chicago Press, 1978).

7. Gary North, *Ethics and Dominion: An Economic Commentary on the Epistles* (Dallas, Georgia: Point Five Press, 2012), ch. 20.

other person. Yet the resistance of Western judges against imposing this physical penalty on their own nation's citizens indicates that they have sought other ways to deal with criminals and victims in crimes involving permanent physical mutilation. Question: In cases other than manslaughter—the death of an innocent third party as a result of unwarranted violence—as in the abortion of Exodus 21:22–23, *may some other penalty legitimately be imposed*, one which meets God's standards of justice, as well as men's sense of justice?

B. Option: Economic Restitution

Say that an ox has been known to gore people in the past. It gets loose again and kills someone. The owner in this instance is held legally liable; in fact, he is to be put to death (Ex. 21:29). However, Exodus 21:30 provides an exception to the requirement that a crime that results in a person's death be punished by the execution of the person responsible. "If there be laid on him a sum of money, then he shall give for the ransom of his life whatsoever is laid upon him." The death penalty is set aside at the discretion of the judges and the victim's heirs. *The man pays a ransom for his life*. The text does not specifically say that the ransom is paid to the victim's next of kin, but this was the familiar pattern in the Old Testament. The payment would become part of the dead person's estate, as if he were still alive and had been merely injured by the beast. The ransom is a restitution payment. There is no evidence that the ransom would go anywhere else except to the victim's heirs.

The question can be raised:If the death of the owner of the ox does not benefit the victim's heirs, while the ransom does benefit them, does the *lex talionis* allow a comparable solution to the problem of the physically mutilated person? Instead of physically mutilating the criminal, may the judges legitimately impose a restitution payment?

1. Jewish Commentaries

Traditional Jewish explanations of the *lex talionis* principle point to a payment in lieu of physical mutilation. Nachmanides wrote in the thirteenth century concerning "eye 'tachath' (for) eye":

> It is known in the tradition of our rabbis that this means monetary compensation. Such a usage [of the term *tachath* to indicate] monetary compensation is found in the verse: *And he that smiteth a beast mortally shall pay for it; life "tacheth" life* [Lev. 24:18], [in which case *tacheth* surely indicates monetary compensation]. Rabbi Abraham ibn Ezra commented that

> Scripture uses such a term to indicate that he really is deserving of such a punishment, [that his eye be taken from him], if he does not give his ransom. For Scripture has forbidden us to take *ransom for the life of a murderer, that is guilty of death* [Num. 35:31], but we may take ransom from a wicked person who cut off any of the limbs of another person. Therefore we are never to cut off that limb from him, but rather he is to pay monetary compensation, and if he has no money to pay, it lies as a debt on him until he acquires the means to pay, and then he is redeemed.[8]

Nachmanides's citation of Abraham ibn Ezra indicates that he was disturbed by the literal wording of the "eye for eye" stipulation. By refusing to call for a literal application of the verse in the case of a poor criminal, and also by their refusal to call for indentured servitude as a way to repay the debt, these two Jewish medieval commentators softened the threat of the punishment.

There are difficulties with this interpretation. It is ingenious, but it has no explicit biblical precedent, and it may therefore be incorrect, even though it appears to conform to the implicit meaning of "eye for eye." It involves speculation that relies heavily on the precedent of economic restitution in the case of the ox that gores someone to death (Ex. 21:30)—a separate case law that may not apply to the *lex talionis* law of Exodus 21:24–25. This view became common in the interpretation of Jewish law. Rabbi Samson R. Hirsch commented on Exodus 21:25 in the mid-nineteenth century: ". . . the taking of this legal canon literally, in the sense of an eye for an eye, would be morally impossible for any idea of equity; . . ." Further, "the whole spirit of the text is what the traditional Halacha [Jewish law] teaches, viz., that here it is only speaking of monetary compensation for the injury inflicted. . . ."[9]

2. Restitution and Equity

In principle, the interpretation of the *lex talionis* as allowing economic restitution in place of physical mutilation raises some fundamental questions. First, is the requirement of vengeance compromised by the imposition of a restitution payment? Is there some fundamental aspect of justice, or men's sense of justice, that should allow a man to "buy his way out" of an injury that he has inflicted on another person? If so, what is this long-neglected aspect of justice?[10]

8. Rabbi Moses ben Nachman [Ramban], *Commentary on the Torah: Exodus* (New York: Shiloh, [1250?] 1973), p. 368.

9. Samson Raphael Hirsch, *The Pentateuch Translated and Explained*, trans. Isaac Levy, 5 vols., *Exodus*, 3rd ed. (London: Honig & Sons, [1860s?] 1967), p. 315.

10. I argue that three principles of justice lead us to such a view of *lex talionis*: victim's

Second, does this law, so interpreted, lead to class antagonism? What if the criminal is poor? He cannot pay what a rich man can afford to pay. Is it fair to allow a rich man to forfeit only money, when the poor man must forfeit his eye or tooth or else become an indentured servant to pay off the debt? Will violent rich people become more careless than violent poor people with regard to injuring others? Are the rich being taught to care less for the law of God than the poor do? If the rich can buy their way out, is society thereby allowing the development of resentment among the poor, who feel that the law is working against them? Is society implicitly subsidizing rich criminals?

The most important questions are these: Has the "eye for eye" principle been abandoned when economic restitution is substituted for physical punishment? Will God honor a society that abandons this literal principle?

But what if the economic interpretation of *lex talionis* is denied? Would the requirement that all criminals pay the full physical price rather than economic restitution really be beneficial to their victims? The victim may need additional capital to compensate for his loss of productivity as a result of the injury. What benefit is it to him that the criminal becomes equally hampered physically?

Furthermore, there are important social consequences of denying the economic interpretation. What benefit is it to society that two people now will suffer from some physical impairment rather than only one? Is the dominion covenant better fulfilled when two men lose an eye or an arm rather than only one man? After he makes economic restitution to the victim, the criminal can work hard and perhaps regain his lost wealth, but he can never regain a lost eye. Society may benefit more in the long run because of the productivity that the convicted man retains. If he repents and becomes a law-abiding member of the community, his greater productivity increases the wealth of all those consumers whom he will serve as a producer.

These questions deserve biblical answers. We can begin to discover answers by examining in detail how the substitution of economic restitution for physical mutilation might work.

C. Establishing a Fair Payment

Let us begin with the case of a victim who has lost his eye. A partially blinded person could insist on a particular restitution payment from

rights, the criminal's right to seek mercy through making a substitute payment, and the limitation of the judges' authority.

the convicted criminal. He could say to the judges, "Tell that man that he can keep his eye, but only if he pays me 100 ounces of gold." The judges would then present this option to the criminal: *your gold or your eye*.

If the criminal values his body more highly than he values the economic restitution demanded by the victim, he pays the money. This is the principle of *victim's rights* in action. On the other hand, if he values the payment higher, or if he simply cannot afford to pay, then he can forfeit his eye. This is the principle of *maximum specified sanctions* in action. The criminal could also make payment by selling himself into indentured servitude, with the buyer paying the victim. But perhaps the convicted man would prefer to lose the use of part of his body rather than becoming a bondservant. He could reject the demand of the victim for economic restitution and insist instead on his legal right under biblical law: to suffer the same physical mutilation that he had imposed on the victim.

1. The Right to Punishment

Each of the parties in this judicial dispute has biblically specified legal rights. The victim has the right to insist on the biblically specified maximum physical sanction: eye for eye. He also has the right to offer the criminal an alternative, one that appears to be less severe than the biblically specified physical sanction. If the alternative offered to the criminal is not regarded by him as less severe, then he has the legal right to insist on the imposition of the biblically specified maximum sanction. He therefore possesses the *right to be punished by the specified biblical sanction*. His punishment is limited by the extent of the injury which he imposed on his victim. The punishment fits the crime.

It is basic to the preservation of liberty that the state not be allowed to deny to either the victim or the criminal his right of punishment. While this principle of the right to punishment is at least vaguely understood by most people with respect to the victim, it is not well understood with respect to the criminal. The right to be punished is a crucial legal right, one which Paul insisted on at his trial: "For if I be an offender, or have committed any thing worthy of death, I refuse not to die: but if there be none of these things whereof these accuse me, no man may deliver me unto them. I appeal unto Caesar" (Acts 25:11).

If the state can autonomously substitute other criteria for deserved punishment, such as personal or social rehabilitation, then society

loses its right to be governed by predictable laws with predictable judicial sanctions. The messianic state then replaces the judicially limited state. Neither the victim nor the criminal can be assured of receiving justice, for justice is defined by the state rather than by God in the Bible. If punishment is not seen as *deserved* by the criminal, and therefore his *fundamental right*, then he is delivered into the "merciful" hands of elitist captors who are not bound by written law or social custom. No one has described this threat more eloquently than C. S. Lewis:

> To be taken without consent from my home and friends; to lose my liberty; to undergo all those assaults on my personality which modern psychotherapy knows how to deliver; to be re-made after some pattern of 'normality' hatched in a Viennese laboratory to which I never professed allegiance; to know that this process will never end until either my captors have succeeded or I grown wise enough to cheat them with apparent success—who cares whether this is called Punishment or not? That it includes most of the elements for which any punishment is feared—shame, exile, bondage, and years eaten by the locust—is obvious. Only enormous ill-desert could justify it; but ill-desert is the very conception which the Humanitarian theory has thrown overboard.[11]

The state represents God in history in His capacity as cosmic Judge (Rom. 13:1–7).[12] When a civil government's leaders say that the state represents any other agent or principle, the state has begun its march toward either tyranny or impotence. Either it will bring judgment on men and other states in the name of its deity, its official source of law,[13] or else some other state will bring judgment on it and those governed by it in the name of a foreign deity. Only a rare nation like Switzerland can defend its borders for centuries, and then only by renouncing all thought of conquest in the name of defense and international neutrality.[14]

The mark of this transformation of the state is when the state insists on imposing the punishment in terms of the supposed "needs of

11. C. S. Lewis, "The Humanitarian Theory of Punishment," in Lewis, *God in the Dock: Essays on Theology and Ethics*, ed. Walter Hooper (Grand Rapids, Michigan: Eerdmans, 1972), pp. 290–91.

12. Gary North, *Cooperation and Dominion: An Economic Commentary on Romans*, 2nd ed. (Dallas, Georgia, [2000] 2012), ch. 11.

13. R. J. Rushdoony, *The Institutes of Biblical Law* (Nutley, New Jersey: Craig Press, 1973), p. 4.

14. It had better have high mountains, civil defense, an armed population, and services such as private banking and a geographical "King's X" facilities for overthrown rulers. See John McPhee, *La Place de la Concorde Suisse* (New York: Farrar, Strauss, Giroux, 1984).

society," meaning ultimately the needs of the state's officers. When the state collects fines for use by the state rather than to pay victims, when it imposes prison sentences paid for by the taxes of law-abiding citizens, and when it insists that every convicted criminal "pay his debt to society," then the messianic state has arrived. God has specified that the victim is His representative in criminal cases, not the state, unless the victim is legally unable to represent himself, in which case the state acts as his trustee. Only if the state is the victim can it lawfully demand restitution. When the state presents itself as the universal victim of all crime to which is owed universal restitution by criminals and taxpayers alike, it has asserted its own divinity.

2. Benefits of Alternative Sanctions

The proposed economic solution to the dilemma of the *lex talionis* offers at least three very real benefits. The first benefit is judicial: *the victim has the right to specify the appropriate punishment*. This punishment is limited only by the maximum penalty specified by biblical law, *eye for eye*. The biblical principle of victim's rights is upheld by the judges. If the victim believes that the criminal's act was malicious, and if he wishes to inflict the same damage on the criminal which he himself suffered, this is his legal option.

To take this retributive approach, however, he necessarily forfeits all the economic advantages that he might have received from a restitution payment from the criminal. He can exercise his legitimate desire for vengeance—his desire to reduce the criminal to a physical condition comparable to his own—but this desire for vengeance has a price attached to it. He is made no better off financially because of his enemy's suffering. In fact, he could be made slightly worse off. He, as a member of the economic community, loses his portion of the other man's lost future productivity, assuming the man cannot overcome the effects of his lost eye or limb. *Vengeance in the Bible's judicial system has a price tag attached to it*. This inevitably reduces the degree of physical vengeance insisted on by victims, for biblical civil justice recognizes the judicial legitimacy of a fundamental economic law: "The higher the price of any economic good, the less the quantity demanded."

The second benefit of this interpretation of *lex talionis* is also judicial: *the criminal who is about to lose his eye or tooth is permitted to make a counter-offer*. He has the right to be punished to the limit of the written law, but he also can suggest a less onerous punishment—less onerous for him, but possibly more beneficial to his victim. He can legally

offer money or services in exchange for the continued preservation of his unmutilated body. The system puts him in the position of being able to pay in order to retain his limbs. *He places a price tag on his body*.

This price tag makes it costly for the victim to pursue an emotion that, had there been no crime, would be called envious: the desire to tear another person down, irrespective of the direct benefits to the person who is envious.[15] But because there has been a crime, envy is legitimate in this case. It must be understood that "getting even" with a convicted criminal is a legitimate goal for the victim of a crime. God eventually "gets even" with Satan and his followers who have sinned against Him; He pulls them down from their positions of power and influence. This process of pulling Satan down began with Jesus's ministry, an event which was manifested by the power of His disciples. "And the seventy returned again with joy, saying, Lord, even the devils are subject unto us through thy name. And he said unto them, I beheld Satan as lightning fall from heaven. Behold, I give unto you power to tread on serpents and scorpions, and over all the power of the enemy: and nothing shall by any means hurt you" (Luke 10:17–19). The victims of violent crime are in an analogous position with God: innocent people who deserve to be avenged. But grace still abounds in history, so the criminal is allowed to make a counter-offer to his victim, just as the sinner can make a counter-offer to God.[16]

The third benefit of this interpretation is social: *the integrity of the legal system is upheld in the eyes of all the nation*. Members of society at large cannot complain that the judges are playing favorites. The judges are not "respecting persons." If a rich man loses money, while the victim has lost the use of his body, this result has been the decision of the victim, not the judges. What is essentially a private dispute, victim vs. criminal, rather than a conflict between classes, has been settled by the disputants. The victim has made his choice. Outsiders therefore have no valid moral complaint against the judicial system. This keeps the ideology of class conflict from spreading to the general

15. Of course, the desire to gain compensation would be regarded as jealousy, in the absence of a crime:the desire to gain at another person's expense. The crime, naturally, does make a difference:the right of the state to avenge the victim is crucial; pseudo-envy or pseudo-jealousy are just that: pseudo. These are legitimate emotions when a crime has been committed that has cost the victim the use of part of his body.

16. When sick or injured people learn that they are about to die, one common reaction is to make a deal with God: specific service for an extension of the gift of life. Contrary to secular humanists and theological liberals, this makes good sense. The dying individual is thereby admitting that God is in control of life and death. This is another reason why dying people deserve to be told that they are dying.

population. This is a very important feature of the justice system in an era of class conflict, meaning an era of rhetoric by competing elites in the name of various classes.

3. Insurance for Criminals?

Should the victim be denied the option of specifying the form of vengeance? Does it thwart justice to set up a judicial system where a rich criminal can offer to "buy his way out"?[17] Worse, what if his rich insurance company can offer to buy his way out?

If criminals could escape the likelihood of physical violence by means of monetary restitution, they might start buying insurance contracts that would enable them to escape the economic penalty of inflicting physical violence. This could be regarded as licensing criminal behavior. No one is going to co-insure another man's eye with his own eye, but the public has already set up co-insurance for monetary claims. Thus, by allowing economic restitution for crimes of violence, criminal behavior might be made less costly to the criminals.

One answer to this objection is that insurance companies are unlikely to insure a person from claims made by victims if the man is a repeat violator. The risk of writing such contracts is too high. Private insurance contracts are designed to be sold to the general public, and to keep premiums sufficiently price competitive, sellers exclude people known to be high risks. Low-risk buyers do not want to pay for high-risk buyers. Furthermore, insurance policies often specify that the coverage is for civil damages rather than criminal acts. This is true of most automobile insurance policies. Policies specify exactly what is to be covered—the famous insurance industry principle of "the large print giveth, but the fine print taketh away."

Policies actually designed by criminals to co-insure would be extremely unlikely. Violent criminals seldom think ahead. They do not work well with others. They are essentially anti-social people. A system of insurance company-subsidized crime could not last very long without government financial aid.

D. The Auction for Human Flesh

By allowing the substitution of an economic payment for actual physical disfigurement, the judges unquestionably do authorize an auction

17. If the criminal could "buy his way out" by bribing the judges, then justice would be thwarted. But judges in a biblical system represent the victims, not the state. If they represent a victim who wishes to be "bought off," where is the injustice?

for human flesh. If a convicted criminal is allowed to pay the victim in order to avoid physical mutilation, he is participating in an auction. Such an implicit auction may sound crass, but so does poking out an innocent person's eye. So does all criminal behavior. Covenant-breaking men may not like to think of criminal behavior in such terms, but this is what the Bible teaches. Sin is the evil, not economic restitution.

1. The Auction Process

We begin our economic analysis of this auction process with a consideration of the victim. Let us assume that he has lost his eye. He tells the judges that he wants to see the other man's eye poked out, just as his was. He offers the criminal no choice between mutilation and restitution. Because the victim initially offers no alternative sanction, the criminal is then allowed to make a single counter-offer, if he wants to. Assume that he makes this counter-offer: 10 ounces of gold instead of losing his eye.[18] Perhaps he is a skilled craftsman who needs both eyes. Perhaps he fears disfigurement. In any case, he places a high premium on his eye. He bids 10 ounces of gold to retain it.

Once the victim receives an offer from the criminal, he may change his mind about his commitment to seeing the criminal disfigured. Perhaps he did not suspect that he could get this much money from the criminal. Perhaps his wife has seen the wisdom of taking the money. He may conclude that he would much prefer 100 ounces of gold to the joy he would receive in seeing (with his remaining eye) his enemy brought low. After all, seeing his enemy part with 10 ounces of gold is also seeing him brought low, and the event brings other benefits, such as all the pleasures or security the 10 ounces of gold can buy. So he accepts the counter-offer. The criminal keeps his eye.

In this case, the criminal is the high-money bidder. The victim values the gold more than he values the criminal's eye. The criminal places more value on his eye than the gold. Each man gets what he most prefers. The criminal has bought the right to determine what happens to his own body. He has bought the right to avoid mutilation.

18. As we shall see, this counter-offer is allowed because the victim did not offer the criminal a choice between mutilation and economic restitution. If the victim specifies a choice between mutilation and a money payment, he is not entitled to accept less money, since this would indicate that he had not been honest when he specified the initial conditions. On the other hand, if the criminal should propose a non-monetary payment, the victim would be entitled to consider it, since this would constitute a different kind of offer from that specified by the victim. See subsection below, "Limiting One's Original Demands."

Consider the victim's other possible choice. He is still outraged at what has befallen him. He wants the criminal to share the same physical limitation. He is unwilling to accept the financial counter-offer. Now, economically speaking, the criminal had just placed 10 ounces of gold into the victim's lap. He had been willing to pay. The victim is not impressed, or not sufficiently impressed. He figuratively hands the 100 ounces of gold back to the criminal. "Keep your filthy money, you butcher! Keep your only remaining eye on your money." The victim has now matched the money bid of the criminal. He has forfeited the 10 ounces of gold that he might have received. He places a higher value on his legal ability to blind the other man's eye than he does on 10 ounces of gold. So, the victim gets what he values most, the joy of seeing the other man lose his eye. But he pays 10 ounces of gold for this pleasure. The pleasure is biblically legitimate, but it is expensive.

The criminal's 10 ounces of gold did not constitute a high enough bid. The victim might have agreed for more than the 10 ounces, but the criminal had not been willing to pay this much. The criminal keeps what he wants: the 10+ ounces of gold that the victim might have accepted in payment, but which the criminal refused to offer. The criminal would rather have this larger quantity of gold than keep his eye. There is what the economists call "reservation demand" for this money; the criminal pays with his eye for his continued possession of the money.

None of this suggests that the criminal can buy justice. Justice is what the court provides when it tries the case and imposes the victim's preferred sanction, up to the limit of the law. The criminal is buying a specific sanction that he prefers by offering the victim an alternative which the criminal hopes the victim will prefer. It is an auction for flesh, not an auction for justice.

2. The Private Slave Market

To give the criminal access to capital sufficient to make the offer, the state must allow another auction for flesh: a slave market. Deny this, and the criminal is thwarted in gaining what he wants, and so is his victim. The most valuable asset a criminal may possess is his own ability to work. If he is denied the legal right to capitalize this asset, he may not be able to offer a sufficiently high bid to the victim to avoid mutilation.

The modern democratic theorist professes horror at such a thought. Why? *Because the modern state's disciples want the state to have*

a monopoly on the slave market. The state imposes prison as the alternative to both restitution and slavery—an alternative which benefits neither the victim nor the potentially productive criminal.

At this point, we return once again to the basic theme of the Book of Exodus: *the choice between slavery to man and service to God*. It is therefore the question of *representation*: Who is represented by the state, God or autonomous man? When autonomous man is represented by the state, then tyranny or impotence is the result. Autonomous man seeks to enslave others, for he seeks to imitate God, just as Satan imitates God. The state becomes the primary agency of this enslavement process. It should not be surprising to learn that the call for the abolition of chattel slavery in the United States began in the 1820s in the Northeast, where the new state prison systems were also being implemented.[19]

Slavery may seem brutal. The *lex talionis* also may seem brutal. Judicially unregulated violence is more brutal. Injustice in the face of crime is more brutal yet. The high penalty imposed on the convicted criminal is intended to impress the criminal, potential criminals, and all ethical rebels of *the majesty of God's law*, and the high price God will impose eternally on those who break it. This no doubt repels the sense of justice of covenant-breakers, but God is not concerned about the ethical sensibilities of covenant-breakers. He is concerned primarily about His own majesty, which is reflected in His law, including the penalties imposed on those who transgress its provisions.

3. Technological Progress and Restitution

With the advent of modern technology, it might be possible for the victim to secure a replacement eye. He might demand an operation, with the criminal's eye being transplanted as a replacement. Or an exchange might be set up: the criminal's eye goes to an eye bank in exchange for an eye that might be more compatible biologically with the victim's system. Alternatively, the judges could allow the criminal to pay for an operation for the victim, and give the victim an additional payment equal to the value of the operation. The criminal would lose the money, but the victim would see again.

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19. David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Boston: Little, Brown, 1971). This same era saw Horace Mann's call for the establishment of a "theologically neutral" tax-financed day school movement, meaning a call for social morality without Christian supernaturalism. When American society began to abandon the God of the Bible, it also began to abandon the institutional foundations of freedom.

This sort of economic resolution to the problem of "eye for eye" standard is ideal: the victim gains what he had lost, and the criminal pays for it, plus restitution for the victim's pain, fear, and trouble. The technological advances brought by Western—and initially Christian—civilization make possible the best solution for both parties, namely, the restoration of the injured man's sight, but at the expense of the criminal. The technological progress that would be brought by a thoroughly Christian civilization would make possible a better set of options for both victim and criminal. The more faithful a society's commitment to enforcing God's law, the more rapid its technological progress is going to be.

E. Limiting One's Original Demands

The threat of actual physical mutilation for the convicted violent criminal will always be present in a biblical legal order. The victim has lost his eye or tooth; the criminal deserves to lose his. But few criminals would sacrifice an eye if they could make restitution in some other way. They might sacrifice a tooth, but not an eye. The victim can legitimately demand the removal of the other man's eye, but there is not much doubt that he would prefer a large cash settlement to help him recover his lost productivity and forfeited economic opportunities. He might even be able to get a new eye through surgery. The rich man is allowed to "buy his way out," but only at the discretion (and direct economic benefit) of the victim. On the other hand, the victim can demand his "pound of flesh," but only by forfeiting the money that he might have been paid.

What if the victim is really vindictive? What if he demands 1,000 ounces of gold for the other person's tooth? In all likelihood, the criminal would prefer to forfeit the tooth. *Under this kind of judicial system, the victim must estimate carefully in advance just what the convicted person might be willing and able to pay*. There must be no "fall-back position" after the victim submits his pair of demands to the judges: physical mutilation or a specified financial restitution payment.

Under a biblical system of economic substitution, the victim would be required by the court to specify the minimum amount of money he would be willing to accept in exchange for not having mutilation imposed on the criminal. The victim would not be allowed to present a false estimate about how much of restitution he would be willing to accept. This would be false witness, or perjury. He could not come back a second time, after the criminal has refused to pay the

10 ounces of gold, and say, "All right, I'll accept 5 ounces of gold instead of his tooth." By lowering his new demand, he would be admitting that his initial offer had been higher than his minimal demand. In short, the injured victim must know in advance that by making an excessive initial financial demand, he might "price himself out of the market"; he therefore has to be reasonable if he is really after money. He might wind up with nothing except the pain and disfigurement of the criminal as his reward. He must ask for less money in order to increase his likelihood of collecting anything.

The judges would present the victim's specified choices to the criminal, and the criminal would have the option of refusing to pay the 1,000 ounces. The judges would then have the physical penalty imposed.

The man condemned by the victim to permanent physical mutilation would have the option of making a counter-proposal if the victim had offered no option to mutilation. The victim could then consider it. Again, the criminal would be allowed only one offer; if the victim still says no, and the criminal then makes a higher offer, he can be presumed to have given false witness when he made the first offer. By limiting the victim to presenting the criminal with only one set of options, and by giving the criminal the opportunity to make a single counter-offer only when no alternative option has been offered by the victim, the judges can obtain honest offers from the beginning.

The court would allow only one form of second-chance bids. If the criminal is unwilling to pay the victim the money payment demanded, but he is willing to pay in some other way than money, he would have the opportunity to present the alternative or group of alternatives for the victim to choose from. But if the victim turns this counter-offer down, the criminal will then have to undergo mutilation. He is governed by the equivalent rule that governs the victim: honest bidding. He offers his highest price or best bid. If it is rejected, he must suffer the physical consequences.

F. The Authority of the Judges

The integrity of society's covenantal civil judges is fundamental to the preservation of social order. The Bible warns rulers and judges to render honest judgment. They are forbidden to take bribes (although it is *not* forbidden for righteous people to offer bribes to corrupt judges).[20] Judges are to render honest judgment because the Bible

20. Proverbs 17:8; 21:14. Cf. Gary North, "In Defense of Biblical Bribery," in Rushdoony, *Institutes of Biblical Law*, Appendix 5; see also Chapter 52:D, below.

requires it and because God requires it, not because it is made personally profitable for them to do so. When citizens distrust the judicial system, a fundamental weakness exists in the society. Bribes are a sign of such weakness and distrust.

1. Initial Penalty

The judges establish the initial penalty payment in the case of a notorious ox that has killed a person (Ex. 21:30). What about in the case of the crime of mutilation? Shouldn't the judges set the penalty? In the case of a non-injurious, accidental, premature birth caused by another man's violent behavior, the husband establishes the penalty, and the judges then impose it. "If men strive, and hurt a woman with child, so that her fruit depart from her, and yet no mischief follow:he shall be surely punished, according as the woman's husband will lay upon him; and he shall pay as the judges determine" (Ex. 21:22). This implies that the judges can overrule the husband if the penalty is thought by them to be excessive. The authority of the judges is supreme in this case.

If it is true that the Bible requires that in the case of bodily mutilation, the judges must assess the penalty, as they do in the case of criminal manslaughter (the owner of the notorious ox), then they must make the decision: economic restitution or physical restitution. Both are legitimate forms of vengeance; both are true forms of restitution. If the judges are solely responsible for making this determination, then sovereignty is transferred to them and away from the victim and the criminal, who might prefer to come to a different, more mutually beneficial transaction. This raises the question of righteous judgment. Why should the victim and the criminal be excluded from the process of the setting of the penalty? After all, in the case of the non-injurious premature birth, the husband has the opportunity of setting a preliminary penalty. Why not in the case of mutilation?

One solution to this dilemma would be to allow the judges to assess the original penalty, estimating what the defense of an eye is worth in the open market, and then make a preliminary announcement of the size of the payment. Then either of the two contending parties could make a counter-offer, which the judges would accept if both parties agree. In this way, the authority of the law would have a visible manifestation—rule by the judges—but the type of restitution could be modified at the discretion of the affected parties. It would be analogous to parents making an arranged marriage:either of the

two children can legitimately protest and refuse the other, but initiating the marriage would be the right of the parents.

It is important that collusion between the judges and either the victim or the convicted criminal be prevented. To help prevent such collusion, dual rights are established:the right of the victim to demand different restitution from that set by the judges, and the right of the criminal to make a counter-offer to the victim when he receives notice of the judges' initial proposal.

There is another factor to consider. Economic value is both objective and subjective.[21] The judges are required by God to attempt to assess the cost to the victim, as well as the cost to the criminal, but they may make a mistake. There is no scientifically or theoretically valid way for judges to assess the comparative costs of injuries, because these costs are based on other people's subjective utilities. For example, if either the victim or the criminal is a right-handed skilled craftsman whose hand is his calling, and he has lost (or is faced with the threat of loss of) his right hand, the penalty is not easily fitted to the crime. Say that the victim has lost his right hand, and he is the craftsman. The criminal is a left-handed lawyer whose right hand is seemingly less crucial to him than the right hand of the victim. Is the loss of the criminal's right hand really a case of "hand for hand"? How can the judges determine what is a really comparable penalty? Hasn't the victim suffered far greater loss? Of course, the reverse could be true:a left-handed lawyer loses his right hand, and the criminal is a right-handed craftsman. Is the *physically* identical penalty really comparable in terms of the costs to each person?

2. The System in Operation

Consider a hypothetical case. A criminal is convicted for having mutilated another man's hand. Let us consider three possible outcomes. *First*, the judges determine that the criminal should lose his hand. Why would they impose this penalty? Perhaps the criminal is a known brawler. He used a weapon to bash a victim's hand, making it permanently useless. The judges decide that the best thing for society would be for the criminal to have his hand bashed into uselessness or amputated, so that he could not easily repeat the offense.

The victim at this point might prefer economic restitution. The brawler also might be willing to pay to keep his hand. In such a case,

21. Gary North, *Sovereignty and Dominion: An Economic Commentary on Genesis* (Dallas, Georgia: Point Five Press, [1982] 2012), ch. 5.

the judges would be placing their perception of the public's need for future social peace above the economic needs of the victim.

The victim would have the option of asking for a different kind of punishment. The victim may want money, so he appeals the decision, and demands monetary compensation. The judges then go to the criminal. Is he willing to pay the victim the proposed monetary restitution? The criminal has three choices:pay the money, accept the judges' original penalty, or offer a third proposal to the victim. If the criminal turns down the request of the victim to be paid, and if the victim rejects the criminal's counter-offer, then the judges' original sentence would be carried out. He would lose the use of his hand.

Second, the judges impose a monetary penalty that is too low in the opinion of the victim. He demands more money. The criminal has a new set of choices: pay the higher penalty, make a counter-offer of something other than money, or lose his hand. He no longer has the option of paying the original penalty established by the judges. The victim has overruled the judges on the question of the appropriate monetary penalty.

Third, the judges impose a monetary penalty. The victim is outraged. He believes that the criminal should lose his hand, just as he lost his. The judges then go to the criminal. You must lose your hand, the victim says. Do you wish to offer the victim more money than we determined originally, or offer something other than money? The criminal makes his decision. If he decides to offer more money or another non-monetary option, he has only one opportunity to persuade the victim. If the victim refuses to accept the counter-offer, the criminal loses his hand.

By allowing the victim to demand different compensation—money or service rather than physical mutilation, or more money than the judges have imposed, or physical mutilation rather than money—the proposed restitution process allows subjective value to assert itself. The *victim* determines whether or not the judges have really offered him what his loss is worth to him personally. If he thinks he is being cheated, he can demand that his enemy pay more or suffer the same physical loss. The *criminal* also has the right to substitute the loss of an appendage, if the judges determine that he should lose the appendage, rather than pay what he believes is an excessive economic demand by the victim, if the demand is higher than the judges originally set.

The Bible does not anywhere indicate that the criminal has any legal, formal ability to overturn the final decision of the highest civil

court of appeal. If the judges impose a particular penalty—mutilation, for example—and the victim is satisfied, then the criminal has no formal right of appeal. He cannot override the decision of the judges. But in fact he really does have the indirect ability to appeal—an appeal through the victim. He or his representatives can approach the victim with a counter-proposal. "Look, I would be willing to pay 10 ounces of gold if you would appeal the decision of the judges to have me mutilated." If this is satisfactory to the victim, he then appeals the decision, and the criminal agrees to the new terms of restitution. The judges are not allowed to overturn this mutually agreed-upon form of restitution.

If the court sets an economic penalty, and the victim agrees, the criminal still has a legal, formal ability to substitute his own mutilation for the economic restitution. He can demand the explicit physical sanction of the law: *lex talionis*. This means that the law upholds his right to demand the punishment specified by God. Bargaining is legitimate, but both the victim and the criminal can insist on the specified penalty. If the victim insists on physical mutilation, the criminal has no choice. If the criminal insists on physical mutilation, the victim has no choice. Bargaining, however, is likely.

By establishing the three-way system of establishing penalties—judges, victim, and convicted criminal—the judicial system receives a means of making *objective* approximations of the inescapably *subjective* "eye for eye" standard—subjective to both victim and criminal. By permitting subjective estimations of loss by both the victim and the criminal, the judges find a way to offer compensation to the victim that he believes is comparable to the crime. The criminal, however, is allowed to counter-offer a different, economic form of restitution penalty if he believes that the cost of a physical penalty is too high.

Conclusion

My discussion of the possible outworkings of the "eye for eye" passage should not be understood as the last word on the subject. It is, however, a "first word." I want readers to understand that the biblical justice system is just, workable, and effective. The *lex talionis* should not be dismissed as some sort of peculiar juridical testament of a long-defunct primitive agricultural society. What the Bible spells out as judicially binding is vastly superior to anything offered by modern humanism in the name of civic justice.

The problems in dealing with the actual imposition of the *lex talionis* principle are great. The history of the people of God testifies to

these difficulties. We have few if any examples of Christian societies that have attempted to impose the "eye for eye" principle literally. The basic principle is clear: *the punishment should fit the crime*. By allowing the victim to demand restitution in the form pleasing to him, and by allowing the criminal to counter-offer something more pleasing to him, the penalty comes close to matching the effects of the crime, as assessed by the victim.

Each party gets to make one offer. If the victim offers a choice between penalties, the criminal chooses which one he prefers, or can offer something completely different. If the victim specifies one and only one penalty, mutilation, the criminal is entitled to counter-offer. If the victim specifies only a money payment, but the criminal prefers mutilation on an "eye for eye" basis, then he has the right to choose mutilation.

The judges can establish the original restitution payment, whether physical or economic, but the two affected parties should have the final determination. This places limits on the state. The economic assets involved in this auction process are transferred (or retained) by the person who is more concerned with economic capital than with physical mutilation. In this way, biblical justice is furthered.

The modern Western world has not imposed deliberate, permanent physical mutilation on violent criminals. These criminals, when convicted, have been imprisoned. They have been compelled to pay fines to the state. In very few cases have they been compelled to make monetary restitution to the victims. The result has been escalating violence against private citizens, as well as the escalating power of the state.

Biblical law imposes penalties on violent criminals that tend to reduce the amount of violent crime. Biblical penalties encourage criminals to count the cost in advance. In the case of "crimes of passion," the convicted passionate criminals would be reminded of the benefits of self-lex talionis principle, provides criminals with a glimpse of (or preliminary down payment to) this cosmic principle of justice.

39

FREEDOM FOR AN EYE

> *And if a man smite the eye of his servant, or the eye of his maid, that it perish; he shall let him go free for his eye's sake. And if he smite out his manservant's tooth, or his maidservant's tooth; he shall let him go free for his tooth's sake.*
>
> EXODUS 21:26–27

The theocentric issue here is ownership. God created the world. He owns it. He upholds it by His grace and in terms of His law. He has established laws governing men's ownership of other men.

The law concerning the striking of a bondservant[1] seems to be in conflict with the immediately preceding verses. The "eye for eye" principle of verse 24 does not seem to be upheld in this passage. The master who has blinded his slave is not to be blinded by the judges. This in turn seems to be a violation of the principle of equality before the law: "One law shall be to him that is homeborn, and unto the stranger that sojourneth among you" (Ex. 12:49). If the master may strike a Hebrew bondservant, putting out his eye, why shouldn't he suffer the same physical consequences? Why is he allowed to retain his sight? Is the law unfair?

Whenever we find a variation in the application of some general biblical law, we should search the context to discover which special circumstances of the case have made mandatory the variation. We must bear in mind that *in principle*, the general law is still in force. God does not change His mind concerning ethics. The ethical terms of His covenant do not change. Nevertheless, in order for the law to apply fairly to those under the terms of the covenant, *differences in*

1. Reminder: I use the word "bondservant" rather than slave, except when referring to permanent ownership of non-Hebrew slaves.

circumstances must be respected. Some people deserve more protection than others because of their place in society. Young children are one example. Widows and orphans are another. So is the bondservant.

A. The Bondservant's Special Position

The Bible recognizes the legitimacy of the institution of indentured servitude. It places this institution under specific laws, and the law governing the injuring of a bondservant is one such law. On the one hand, as we shall see, the master needs special legal protection from the false claims of a disobedient bondservant. On the other hand, the dependent bondservant needs special legal protection against excessive discipline by the master. This law governing physical punishment protects both master and bondservant.

We need to examine the biblical principles that undergird this law. First, the master has legitimate authority over the bondservant. The bondservant is a form of property. The master is allowed to assign tasks to the bondservant that produce profit for the master. In this sense, the bondservant is his property, for the fruits of the bondservant's productivity belong to the master, as if he were a beast or a tool. The master may not mistreat the bondservant, however, as this law indicates. The bondservant is not without legal protection, but he is not a free man. The "eye for eye" principle is applied differently in the case of a bondservant because the legal relationships are different from those governing free men.

Second, ownership is an inescapable social function. We say that ownership necessarily involves *stewardship*. The ownership of an asset imposes certain inescapable costs on the owner. He must make decisions about how to use an asset, or whether or not to divest himself of ownership. If he uses the asset in one way, he cannot use it in another. By earning income (or attempting to) by using an asset in one productive process, he necessarily forfeits whatever income he might otherwise have produced with the asset.[2] He must choose what to do with whatever assets he legally controls. This is called *allocation*.

The bondservant's owner has a capital asset at his disposal. The bondservant can produce income for him. An economically rational purchaser of a bondservant looks at the expected future stream of income—net income, after caring for the bondservant's physical needs—and he then discounts this by the prevailing rate of interest.

2. Gary North, "Ownership: Free but Not Cheap," *The Freeman* (July 1972). Reprinted in *An Introduction to Christian Economics* (Nutley, New Jersey: Craig Press, 1973), ch. 28.

He will pay no more for a bondservant than he will pay for any other capital asset that is expected to produce the same net output, nor will the seller sell the bondservant for less.[3] If he pays more, he will lose money on the investment. On the other hand, he cannot buy the bondservant for less, because the competitive bids of other potential buyers keep the bondservant's price high. The bondservant's market price will be the same as the market price of a piece of land that is leased for the period of his bondage, or a bond, mortgage, or any other productive asset that produces the same net economic return over the same period of time.

It may bother some people to learn that the market price of the human bondservant is governed by the same economic forces that govern all other economic assets that are expected to produce the same rate of return. This seems to equate people with things. But we also know that buyers and sellers make their economic decisions in terms of economic costs and benefits. Unless the buyers are sadists who love to mistreat people (and who are therefore willing to pay more than the market price of leased land or a bond in order to assure their ownership of a bondservant),[4] the market price of the bondservant will equal the market price of any economic asset that is expected to produce the same rate of return. As we shall see, this equation of market prices for all equally productive assets is one of the aspects of a market economy that protects the bondservant from abuse.

So, from the point of view of economic return on the investment, the bondservant is not in a special position. But the Bible teaches that he is a human being, not a beast of burden or a machine. He is therefore singled out for special protection by civil law.

B. Self-Interest and Self-Restraint

The bondservant-owner's quest for profit places limits on his relationship with his bondservant. The bondservant is expected to be a producer of net income. The owner risks losing this income, or part of the income, if he permanently mutilates the bondservant. First, there will be the loss in productivity associated directly with the bondservant's physical loss. Second, there could also be loss as a re-

3. There is this exception: to the degree that owning a slave is a prestige factor, the buyer will pay more, and the seller will demand more. The value of the slave in this case reflects his position as both a capital good and a consumer good.

4. This really does not invalidate the general rule. The sadist is receiving non-monetary returns psychologically through the suffering he imposes on the slave. Thus, he will pay more to buy the human asset.

sult of the mistreated bondservant's resentment. He will not perform as expected. *The market's forces of profit and loss restrain the bondservant's owner*. The civil authorities can presume that the bondservant's owner is not going to mistreat his bondservant physically to the extent that the bondservant's performance will be seriously impaired. *Because of the competitive market for the bondservant's economic output, civil authorities can more safely delegate authority to the bondservant's owner*. This decentralizes power in the society. The competitive market, through the self-interest of the bondservant's owner, serves as an institution that restrains the illegitimate use of power. The economic costs of lawless behavior are borne by the bondservant's owner. This is true of all capital resource ownership. This is why the bondservant's economic position as a capital asset protects him.

Bondservants are understood to be potentially rebellious. This is clearly true in the case of criminals who are sold to masters in order to raise money for the restitution payment to the victims. But rebellion is not limited to criminals. Men are by nature rebellious. They resist authority, both lawful and unlawful. Adam rebelled against God; bondservants rebel against masters. Without a means of enforcing lawful authority, no form of external government could exist. The bondservant system is an aspect of biblical family government in the Bible. Thus, the bondservant's owner possesses the legitimate authority to inflict limited physical punishment. What the Bible restrains is punishment that inflicts *permanent physical damage*.

There are five reasons why we can presume for this prohibition. *First*, men are made in God's image, and therefore they deserve protection. *Second*, interpersonal relationships between people are threatened when one person has seemingly unlimited power to impose his will on another. Punishment is supposed to increase respect for the law, the master, and God on the part of the bondservant, not foster an urge to revenge because of the outrageous nature of some type of punishment. Evil calls forth evil. *Third*, permanent injuries generally restrict people's ability to exercise dominion. Punishment is not to thwart the dominion covenant. *Fourth*, a man's spirit can be broken by continual, ruthless beatings. Without the protection of law, the victim may see himself as exploited and without hope. This also conflicts with the psychology of dominion. The law provides him with an area of safety. He is to increase his dominion by his subservience to God's law. This, in fact, is one of the functions of indentured servitude: to bring men under God's law. *If there is no protection, then there*

is no law. Without law, there can be no dominion. Indentured servitude is supposed to teach this biblical principle of life.

C. Judicially Unrestrained Violence: The Lure of Autonomy

There is a fifth reason why it was illegal for the bondservants' owners to inflict permanent physical damage on their slaves. This reason is more narrowly theological in nature. It is one which contemporary Christians do not want to think about: *eternal punishment*.

Slavery and bondservice point to man's subordinate relationship to God. This relationship, being covenantal, is governed by the inescapable aspect of all covenants, judgment. There are two forms of covenantal judgment: blessing and cursing.[5] The blessing side of slavery is the *judicially guaranteed prospect of release*. A slave who matures and learns to be self-disciplined and productive is to be released, and civil law is to enforce his right to freedom by establishing specific performance standards for slaves. This hope of eventual release must not be destroyed. Thus, slavery points to covenantal blessing. It points to God's final release of covenant-keepers from bondage to sin and death.

On the other hand, slavery also points to the other side of God's final judgment, the eternal curse: the lake of fire (Rev. 20:14). It points to God's position as cosmic Slavemaster. In the lake of fire, the "whipping" never ceases. The physical sanctions are eternal. These physical sanctions have no redeeming value, meaning no redemptive purpose. God whips rebels forever in order to satisfy His own sense of justice. But the inflicting of permanent cursing is exclusively God's decision and activity. Men are never to imitate God in this respect. *Men in history are never to be given the power to impose non-redemptive sanctions, either physical or spiritual*. Even capital punishment is legally only a change in venue: convicted criminals are transferred to God's court for final trial and sentencing. This is why the Bible provides no authorization for torturing those who have been legally condemned to execution.

D. Freedom: The Best Compensation

Biblical law makes the presumption that *a master who is not self-restrained is incapable of exercising responsible dominion over the bondservant*. Dominion is always to be in terms of God's law. The master is in

5. Ray R. Sutton, *That You May Prosper: Dominion By Covenant*, 2nd ed. (Tyler, Texas: Institute for Christian Economics, [1987] 1992), ch. 4.

a weak position to teach the bondservant the basics of the dominion covenant if he is himself not self-restrained. Self-government is the fundamental level of government in human affairs. God's law promotes self-government.

The bondservant's owner may misuse his authority by inflicting excessive punishment. The bondservant loses the use of his eye or tooth. How is he to be compensated? By a *non-literal* application of the "eye for eye" principle. The Bible recognizes the ultimate earthly desire of a God-fearing bondservant who is in bondage to a master who does not exercise self-restraint: *freedom*. The civil authorities do not put out the master's eye or knock out a tooth. If his master were to lose an eye to match his eye, then the bondservant would be no better off, and the brooding master might attempt to murder the bondservant in order to gain revenge.

The injured bondservant is rewarded with his freedom. This reminds the bondservant of the essential righteousness of God's law. It also reminds the undisciplined former owner of the same thing, as well as the necessity of his exercising self-restraint in the future. *The bondservant is taken out of the jurisdiction of a lawless man*.

The victim receives compensation for the loss he has sustained. While his physical ability to exercise dominion may be permanently impaired by a physical injury, the increase of the scope of his authority compensates him. The former bondservant's freedom also benefits society, if the bondservant becomes successful in some free market activity. The lure of self-interest which the market provides may offset the loss of productivity which results from the physical injury. Thus, the terms of the dominion covenant are more closely fulfilled. Output increases because of the incentives provided through freedom. The bond servant will now receive the fruits of his labor, not the former master. This increased productivity benefits both the bondservant and consumers.

The bondservant is not compensated in any other way. The law does not require the master to provide him with tools or other capital assets. This indicates that the value of personal freedom is very high—so high, in fact, that the loss of a tooth barely compares with it. Freedom is such an advantage that it can barely be compared with the losses associated with physical impairment. Freedom is the reward for both the loss of a tooth or an eye. It is so valuable in comparison with physical impairment that no additional compensation is granted to the bondservant who has lost an eye, even though an eye is more

valuable than a tooth. So precious is freedom that the eye-less bondservant cannot legitimately protest to God or the authorities that he has received the compensation "only" of the tooth-less man.[6] He does not receive "freedom plus." Freedom is sufficient.

Biblical law substitutes the bondservant's freedom for a retaliatory loss of the master's tooth or eye. This substitution may or may not be to the liking of the master. The economic loss of the bondservant may be greater in the opinion of the master than the loss of his own tooth, but he has no choice in the matter. He must allow the bondservant to go free.

This substitution is evidence of the legitimacy of substitution in other non-capital "eye for eye" crimes. In cases involving free men, the victims can demand compensation other than the literal inflicting of physical mutilation of the criminals. *The goal is dominion*. Free men are allowed to "get even" with those who have mistreated them, not necessarily by pulling their enemies down to their physically damaged level (although this is the victim's option), but rather by increasing their own wealth and productivity. This is also how the mistreated bondservant is supposed to "get even." The guilty party does lose, just as the victim has lost, but *the loss is a form of economic compensation to the victim*—a grant of capital (freedom) to the victim that may enable him to perform the tasks of dominion more effectively. The criminal is "pulled down," but the victim is also "raised up."[7] The motivation of the bondservant is not to be envy—pulling down the master without any compensating move upward on the part of the bondservant.[8]

E. Protecting the Bondservant-Owners

The "freedom for an eye" law also protects the bondservant-owning class. This may not be immediately apparent. Consider an alterna-

6. I had never noticed a curiosity of the English language before I wrote this sentence. "Eyeless" is a term for a totally blind man, not "eyesless." The same is true of "toothless" rather than "teethless." We have no convenient terms for "one eye less" and "one tooth less."

7. We have seen in chapter 37 that "pulling down" the criminal is lawful in the case of the "eye for eye" law between free men (Ex. 21:22–25). The victim can demand physical punishment of the criminal. This prerogative is unlikely to be exercised often. Men generally want capital more than physical revenge. The option of demanding physical vengeance is more important as a device for pressuring the criminal to pay what he really regards as a fair price to the victim—a payment to avoid the same injury. It creates incentive for the criminal to pay the appropriate economic compensation to the victim.

8. On the distinction between envy and jealousy (meaning covetousness), see the classic book by sociologist Helmut Schoeck, *Envy: A Theory of Social Behavior* (New York: Harcourt Brace Jovanovich, [1966] 1970).

tive rule: strict eye-for-eye vengeance. Let us say that a bondservant's owner faces an unruly bondservant. He knows that he must maintain order in his household—defined in the broadest sense—and without his ability to inflict physical punishment, this particular bondservant is unlikely to respond to his commands. Inflicting physical damage on him is always risky. The bondservant might be permanently damaged. The owner might lose the production that the bondservant would otherwise have provided. Additionally, the owner might be convicted by a court of exercising illegitimate brutality, and have his own body mutilated. Nevertheless, the bondservant would not go free.

What if the bondservant finds the owner alone in a field and attacks him? How is the owner to defend himself? If he puts out the eye of his attacker, but *there are no witnesses* who can testify that his action was in self-defense, the bondservant has him at a disadvantage. The bondservant can claim in a court that he had been thoughtlessly or maliciously mutilated by the owner. This will not gain him his freedom, but the master will lose his eye if the bondservant loses his.

An envious bondservant might accept this loss, to "bring down" a person who possesses authority over him. After all, if the bondservant cannot gain his freedom as a result of his loss, and the master will be punished physically, then an envious bondservant might think to himself: "If I attack this man, I get even. If he defends himself and really hurts me, I can still get even. The power to inflict pain at will is transferred to me, if I'm willing to accept the risk of physical loss. The master may even be afraid to fight back, for fear of injuring himself by injuring me. I have him at a disadvantage. All I need to do is to be willing to risk the loss of my tooth or eye. I will be worse off, but so will he. He has more to lose than I do. I'm only a bondservant. I'm used to hardship. He isn't. He will be more afraid of me than I am of him. I have the upper hand, for I have the willingness to suffer more physical damage than he does."

The bondservants' owners need to maintain their authority. The way that we exercise dominion is to submit ourselves to God's law. *Self-restraint leads to dominion*. It is no different for bondservants' owners. The master must be able to impose his will on the bondservant in external ways. To make more certain that the bondservant is restrained, there must be incentives for the bondservant to comply. *The bondservant, no less than the master, needs self-government*. The bondservant, no less than the master, needs to count the costs of rebellion.

A bondservant who is granted the ability by law to inflict permanent damage on his master merely for the price of suffering the same injury, is a dangerous bondservant. If he is willing to accept the pain, and the master isn't, then the bondservant is given the upper hand. The social order of society is threatened. Power is transferred from those who will not accept pain to those who will. But power in a godly society should be based on *moral authority*, not the comparative ability to withstand pain. Power should be based on *ethical standing before God*, not tolerance for pain.

A bondservant-owner in a society whose civil law recognizes the principle of "freedom for an eye" who is attacked without witnesses present knows that he can defend himself to the utmost. If he cannot prove self-defense in the court, then the worst he will suffer is the loss of the bondservant. But at the moment a man is attacked, the thought of the removal of the bondservant from his presence is not really that repugnant to him. The bondservant-owner will not hesitate to defend himself under such circumstances. The bondservant knows this.

The freedom-seeking bondservant might think to himself: "If I attack the man in private, and he mutilates me, I can go free. I will do it. I want my freedom more than I want my tooth. On the other hand, he might punch out my eye. There are risks here. I can go free in a few years anyway. This is not a permanent position of servitude. Is it worth the possible loss of my eye to gain my freedom a few years early? I may not be able to hurt him very much, and he will not hesitate to beat me to a pulp. Is an attack worth the risk?" The bondservant counts the cost. In a Christian society governed by biblical civil law, in which servitude is not permanent, but can extend at most for seven years, will he risk forfeiting his eye for the rest of his life? He must pay a high price for rebellion-based freedom. The court may decide against him anyway and convict him of assault on the owner. Attacking the bondservant-owner in secret is a very risky act. The bondservant is restrained by the threat of physical punishment by the owner, and the court may not impose any penalty on the owner. The master is restrained, at most, by the threat of losing the bondservant. The master has the edge in this case.

F. The Foreign Slave

The foreign slave, like the committed criminal sold into permanent bondage, was in a different situation. He was not guaranteed release

after a fixed period of time (Lev. 25:44–46).[9] He therefore might have been willing to attack the slave-owner in secret, not fearing physical retribution, for the reward would be freedom. Provoking a Hebrew master to excessive punishment might have been to the advantage of a foreign slave. The price of freedom was mutilation—a price that some slaves might have been willing to pay.

1. Separation

This would have been an incentive for masters to avoid being alone with foreign slaves. In the absence of witnesses, the slave could do two evil things. First, he might attack the owner in order to cause the owner to mutilate him in self-defense. Then he could claim to be the victim. Second, he might self-mutilate himself and then claim that the owner had struck him. In the absence of witnesses, the court might decide in his favor, especially if the slave-owner had a reputation for violence. These possibilities increase the risks to an owner of being alone with a foreign slave.

By separating foreign slaves from Hebrew masters, the law also tended to separate the religious rites of foreign slaves from their masters. In the Old Testament commonwealth, there would have been fewer opportunities for Hebrew masters to learn the secret rites of demon-worshipping foreign slaves. An owner would have been more likely to have witnesses present in his dealings with foreign slaves, and therefore capital punishment for his worship of false gods would always have been far more likely. Intimate contacts between foreign slaves and Hebrew masters would have been less likely. In private, the master would have been at a disadvantage to the slave, compared to the advantage he possessed in public. The slave would have had more to gain from such contacts than the master: (1) an opportunity to attack him and provoke a freedom-producing response; (2) an opportunity to fake an attack through self-mutilation; and (3) an opportunity to convert him to the worship of the slave's hidden gods of darkness.

There are other intimacies between master and slave that would have borne great risks to the Hebrew master. Secret encounters with foreign slaves for sexual contact would have been made less likely because of the law that offered freedom to mutilated slaves. The slave might argue in court that the master had attempted to violate her

9. Gary North, *Boundaries and Dominion: An Economic Commentary on Leviticus*, 2nd ed. (Dallas, Georgia: Point Five Press, [1994] 2012), ch. 30.

(or him, in the case of sexual deviation), and when she resisted, he attacked her physically. This might actually be true; resistance by the slave might provoke a lawless master to violence. Or it could be a lie—perhaps the lie most easily believed by a court. In either case, secret associations with a foreign slave would be reduced if the "freedom for an eye" law was enforced. Only the most trustworthy foreign slave would have had access to a master in total privacy.

2. The Jubilee Year

With respect to the jubilee law, which alone authorized Israelites to own permanent foreign slaves, this "freedom for an eye" law served to separate Hebrew masters from their foreign slaves. This was probably more of a protection for Hebrew masters than foreign slaves. Hebrews under the Old Covenant were highly vulnerable to the lure of foreign gods. The Old Testament laws concerning ritual pollution, which included the dietary laws, pointed to the defensive position of the Hebrews spiritually: death contaminated them ritually because theologies of death lured them repeatedly. It was only after Christ's ministry cleansed the ground, making possible the annulment of the laws concerning ritual pollution,[10] that God's people could at last be self-confident in their offensive campaign against evil. It was only then that the conquest of the nations became ritually easy.

At that point in covenantal history, however, the jubilee laws were abolished. All of Leviticus 25 became a dead letter. This included the law allowing permanent household slavery. No longer were slaves allowed to be imported from the lands around God's people, for God's people were now enabled to extend the kingdom of God far more easily than before Christ's death and resurrection cleansed the earth

10. James Jordan wrote: "In the Old Covenant, the land was perpetually defiled, and only provisionally cleansed by a variety of cleansing actions, the most prominent being the annual cleansing on the Day of Atonement (Lev. 16). Apart from this, the holy land of Canaan would revert to a defiled status. Within this annual provisional cleansing, there was the possibility of local, occasional defilements. . . . In the New Covenant, the land is perpetually cleansed. It is only the occasional defilement which must be dealt with. The ceremony of dealing with it is not the sacrifice of slaying an animal, or the death of a Church leader, but the ceremony of the Church's declaring a man forgiven and permitting him to partake of the Holy Eucharist, which applies the finished sacrifice to him. Such a ceremony would be an important part of a Christian society." James B. Jordan, *The Law of the Covenant: An Exposition of Exodus 21–23* (Tyler, Texas: Institute for Christian Economics, 1984), pp. 101–2. This is why any attempt to revive the ritual slaying of animals, even as a "memorial," is a return to the heresy of the Judaizers. Baptism and Holy Communion, not the slaying of animals, are the only memorial of rituals of cleansing that remain.

ritually. There were to be no more "heathen that are round about you" nationally (Lev. 25:44); heathen would henceforth be immediately round about God's people, because God's people were to enter heathen lands, bringing the gospel and discipling the nations (Matt. 28:19).[11] God's people were to be in close contact with racially and culturally foreign household slaves, even in private, sometimes as brothers in the faith. At that point, the law of permanent household slavery had to go, to protect the slave-owner as much or more than to protect the slave.

Conclusion

The goal of servitude in the Bible is liberation through self-discipline, dominion through service. This is true for both the master and the bondservant. Each must show self-restraint or else suffer penalties. A lawless, undisciplined, violent master therefore loses legal control over his bondservant. This law reminds us that the exercise of power must be governed by law; he who holds power is supposed to hold it by means of his moral authority as well as by the sword. To the extent that the master is handed the sword by the civil government, as an agent of the civil government, he is under restrictions imposed by God's law through the civil government.

This law protects slaves from lawless tyrants. It also protects masters from cost-calculating, envious, violent slaves. The penalty of losing the slave raises the price of lawlessness to the master. Simultaneously, the inability of the court to impose physical retribution on the owner restrains the envious bondservant in any attempt to "get even" with the master by provoking a physical attack on himself. By limiting the duration of debt servitude to seven years, the incentive to revolt is minimized among bondservants. An act of physical rebellion against a master which might cost the bondservant an eye is less advantageous in a society with a time limit on slavery. If bondservants wait a few years, they will keep their eyes and also gain freedom. Better to bear the rule of the master patiently.

God defines deviant behavior in His law. Individuals and societies that transgress these standards of deviance are eventually placed under God's formal judicial sanctions, in history (Deut. 8:19–20)[12]

11. Kenneth L. Gentry, *The Greatness of the Great Commission* (Tyler, Texas: Institute for Christian Economics, 1990).

12. Gary North, *Inheritance and Dominion: An Economic Commentary on Deuteronomy*, 2nd ed. (Dallas, Georgia: Point Five Press, [1999] 2012), ch. 23.

and beyond history (Matt. 25:31–46). The American South was not deviant in terms of ancient historical precedent regarding permanent slavery; the North was. The fact is, the South was deviant in terms of God's written standards, for its legislators and judges honored neither Old Testament laws governing servitude nor Jesus' abolition of permanent slavery in His abolition of Israel's jubilee land tenure laws. It took a long time, but God eventually imposed His sanctions by means of Northern aggression, for the North had more closely approached the biblical norms regarding permanent slavery.

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THE RANSOM FOR A LIFE

> *If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit. But if the ox were wont to push [gore] with his horn in time past, and it hath been testified to his owner, and he hath not kept him in, but that he hath killed a man or a woman; the ox shall be stoned, and his owner also shall be put to death. If there be laid on him a sum of money, then he shall give for the ransom of his life whatsoever is laid upon him. Whether he have gored a son, or have gored a daughter, according to this judgment shall it be done unto him.*
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> EXODUS 21:28–31

The Bible tells us that we live in a universe that was created by God at the beginning of time and history, and that this world is sustained by Him, moment by moment. The doctrines of creation and providence are therefore linked. The universe which God created, He presently sustains. We live in a world of cosmic personalism.[1] God's answer to Job, beginning in chapter 38 and continuing through chapter 41, presents a summary of the total control of all events by God.[2]

In such a world, men cannot escape full responsibility for their actions. God holds them responsible for everything they think, say, and do. "But I say unto you, That every idle word that men shall speak, they shall give account thereof in the day of judgment" (Matt. 12:36). "But I say unto you, That whosoever looketh on a woman to lust after her hath committed adultery with her already in his heart" (Matt. 5:28). Everything people do is done within a personally sustained,

1. Gary North, *Sovereignty and Dominion: An Economic Commentary on Genesis* (Dallas, Georgia: Point Five Press, [1982] 2012), ch. 1.
2. Gary North, *Predictability and Dominion: An Economic Commentary on Job* (Dallas, Georgia: Point Five Press, 2012), ch. 6.

God-ordained universe (Rom. 9). They succeed or fail in terms of God's decree. They run to God ethically, or they run away from God unethically; they cannot run away from Him metaphysically. God is everywhere; there is no escape: "Whither shall I go from thy spirit? Or whither shall I flee from thy presence? If I ascend up into heaven, thou art there: if I make my bed in hell, behold, thou art there" (Ps. 139:7–8). "Am I a God at hand, saith the LORD, and not a God afar off? Can any hide himself in secret places that I shall not see him? saith the LORD. Do not I fill heaven and earth? saith the LORD" (Jer. 23:23–24).

Human action is always personal, never impersonal. First, it is personal primarily with respect to God. God is the ultimate, inescapable fact of man's environment, not sticks and stones. Second, human action is secondarily personal with respect to oneself: one's goals, choices, and assets. Third, human action is personal with respect to other human actors, both as individuals and as covenantal groups. Fourth, human action is personal with respect to the environment, which God has created and presently sustains, and over which He has placed mankind. Man's responsibility extends *upward* to God, *inward* to himself, *outward* toward other men, and *downward* toward the environment. It is comprehensive responsibility. When we speak of "responsible men," we should have this four-part, comprehensive responsibility in mind, not just one or two aspects. A person may appear to be responsible in one or two areas of his life, but whether he likes it or not, or whether he is adequately instructed or not, he is covenantally responsible before God in all four ways, and he will be held totally accountable for his thoughts and actions on the day of judgment.

A. Liability for Damages

Although God holds each person fully responsible, no agency of human government has the power to do so. This is why we must affirm as Christians that with respect to the decisions of human governments regarding men's personal responsibility, there must always be *limited liability*. No agency of human government is omniscient; none possesses the ability of God to read the human heart or to assess damages perfectly. We must wait for perfect justice until the day of final judgment. To insist on perfect justice from human government is to divinize that agency. It will also lead to its bankruptcy and the destruction of justice.[3]

3. Chapter 19.

The case laws of Exodus function as the groupings under which many different kinds of disputes over liability for damages can be classified. This has been recognized by Jewish scholars for at least two millennia. Later Jewish law created various categories of offenses subject to private lawsuits ("torts") that were based on the case laws of Exodus. Jewish legal scholar Shalom Albeck wrote:

> Four principal cases are considered: (1) where someone opens a pit into which an animal falls and dies (Ex. 21:33–4); (2) where cattle trespass into the fields of others and do damage (Ex. 22:4 [English version, 22:5]); (3) where someone lights a fire which spreads to neighboring fields (Ex. 22:5 [Eng. 22:6]); (4) where an ox gores man or beast (Ex. 21:28–32, 35–6). To those has to be added the case where a man injures his fellow or damages his property (Ex. 21:18–19, 22–5; Lev. 24:18–20). The Talmud calls the cases contained in the Torah primary categories of damage (*Avot Nezikin*) and these serve as archetypes for similar groups of torts. The principal categories of animal torts are: *shen* (tooth)—where the animal causes damage by consuming; *regel* (foot)—where the animal causes damage by walking in its normal manner; and *keren* (horn)—where the animal causes damage by goring with the intention of doing harm or does any other kind of unusual damage. The other principal categories of damage are: *bor* (pit)—any nuisance which ipso facto causes damage; *esh* (fire)—anything which causes damage when spread by the wind; and direct damage by man to another's person or property. These principal categories and their derivative rules were expanded to form a complete and homogeneous legal system embracing many other factual situations. As a result they were capable of dealing with any case of tortious liability which might arise.[4]

The key issue is personal responsibility. Who is responsible for damages sustained, and what are the appropriate penalties? The case laws provide us with the governing standards for assigning legal responsibility for damages and the appropriate penalties.

B. Responsibility: Upward and Downward

Man's responsibility outward and downward is seen in this section of Exodus. A man owes protection to his fellow man, which includes women, as the passage at the beginning of the chapter clearly points out. This passage also teaches that "dumb animals" under a man's personal administration are responsible, through him, for their ac-

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4. "TORTS. The Principal Categories of Torts," in *The Principles of Jewish Law*, edited by Menachem Elon (Jerusalem: Keter, 1975?), col. 319. This compilation of articles taken from the *Encyclopedia Judaica* was published as Publication No. 6 of the Institute for Research in Jewish Law of the Hebrew University of Jerusalem.

tions. They are responsible upward to mankind through their master, as well as outward to other beasts through their master (v. 35). Human society enforces sanctions against lawless behavior, whether in the animals or their owners. Domesticated animals are responsible to mankind through their owners, and therefore society holds the owners responsible for those animals under their control. Animals that are not domesticated—neither trained nor tamed—are to be under physical restraint, at the owner's expense.

1. Domesticated Beasts

The shedding of man's blood is illegal, either by man or beast. "But flesh with the life thereof, which is the blood thereof, shall ye not eat. And surely your blood of your lives will I require; at the hand of every beast will I require it, and at the hand of man; at the hand of every man's brother will I require the life of man. Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man" (Gen. 9:4–6). The ox that gores a man to death cannot escape the sanctions of biblical law. Neither can other man-killing animals.

In the case of the ox, the animal is presumed to be domesticated, for if it were dangerous, the owner would be required to restrain it. The owner becomes legally liable because what was, in fact, a dangerous animal had been publicly treated by him as if it had been safe. *The owner deliberately or inadvertently misinformed the public about the risks*. He did not place restraints on it. The victim died because of the owner's neglect. The owner should have placed restraints on the beast, or else he should have placed warnings for bystanders.

Why shouldn't bystanders recognize that the animal is dangerous? Why are they considered judicially innocent? Don't people know that bulls charge people and gore them? They do know, which is why the Hebrew usage, as in English, indicates that "ox" in this case must refer to a castrated male bovine. The castrated beast is not normally aggressive. It is easier to bring under dominion through training. In this sense, a castrated male bovine is unnaturally subordinate.

As an aside, the question of unnatural subordination (lack of male dominion) can also be raised with respect to the prohibition against immigrant eunuchs' becoming citizens (Deut. 23:1). Presumably, this was because eunuchs could not produce a family, and to that extent they were cut off from the future. Rushdoony wrote (unfortunately using the present tense): "Because eunuchs are without posterity, they

have no interest in the future, and hence no citizenship."[5] This was true enough in ancient Israel, where land tenure, bloodlines, political participation (elders in the gates), and the national covenant were intermixed. The New Testament forever abolished this biological-geographical intermixture. Spiritual adoption[6] became forthrightly the foundation of heavenly citizenship (Phil. 3:20), and therefore the only basis of church membership. The baptism of the Ethiopian eunuch by Philip the deacon (Acts 8)[7] indicates that the Old Testament rule lost all meaning, once Jesus, the promised seed, had come and completed His work.

The goring ox is also judicially guilty. It is therefore treated as a responsible moral agent—not to the extent that a man is, of course, but responsible nonetheless. We train our domestic animals. We beat them and reward them. Modern scientists call this training "behavior modification." In other words, we deal with them on the assumption that they can learn, remember, and discipline themselves. Anyone who has ever seen a dog that looks guilty, which slinks around as if it has done something it knows is wrong, can safely guess that the dog *has* done something wrong. It may take time to find out what, but the search must begin. The dog *knows*.

2. An Ethically Unclean Beast

The goring ox is to be treated as if it were an unclean beast. It has become an ethically unclean beast. Because of its ethical uncleanness, it is still subject to this punishment in New Testament times, despite the New Testament's abandonment of the category of physical and ritual uncleanness. James Jordan commented on the biblical meaning of unclean animals.

> All unclean animals *resemble the serpent* in three ways. They eat "dirt" (rotting carrion, manure, garbage). They move in contact with "dirt" (crawling on their bellies, fleshy pads of their feet in touch with the ground, no scales to keep their skin from contact with their watery environment). They revolt against human dominion, killing men or other beasts. Under the symbolism of the Old Covenant, such Satanic beasts represent the Satanic nations (Lev. 20:22–26), for animals are "images"

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5. R. J. Rushdoony, *The Institutes of Biblical Law* (Nutley, New Jersey: Craig Press, 1973), p. 100.

6. John 1:12; Romans 8:15; Galatians 4:5; Ephesians 1:5.

7. That a deacon performed this baptism, as well as many others in Samaria, creates a presently unsolved theological problem for all denominations that specify elders as the only ordained church officers with a lawful call to baptize.

of men. To eat Satanic animals, under the Old Covenant, was to "eat" the Satanic lifestyle, to "eat" death and rebellion.

The ox is a clean animal. The heifer and the pre-pubescent bullock have sweet temperaments, and can be sacrificed for human sin, for their gentle, non-violent dispositions reflect the character of Jesus Christ. When the bullock enters puberty, however, his temperament changes for the worse. He becomes ornery, testy, and sometimes downright vicious. Many a man has lost his life to a goring bull. *The change from bullock to bull can be seen as analogous to the fall of man*, at least potentially. If the ox rises up and gores a man, he becomes unclean, fallen. . . .

The *unnaturalness* of an animal's killing a man is only highlighted in the case of a clean, domesticated beast like the ox. Such an ox, by its actions, becomes unclean, so that its flesh may not be eaten. . . .

The fact that the animal is stoned indicates that the purpose of the law is not simply to rid the earth of a dangerous beast. Stoning in the Bible is the normal means of capital punishment for men. Its application to the animal here shows that animals are to be held accountable to some degree for their actions. It is also a visual sign of what happens when a clean covenant man rebels against authority and kills men. Stoning is usually understood to represent the judgment of God, since the Christ is "the rock" and the "stone" which threatens to fall upon men and destroy them (Matt. 21:44). In line with this, the community of believers is often likened to stones, used for building God's Spiritual Temple, and so forth. In stoning, each member of the community hurls a rock representing himself and his affirmation of God's judgment. The principle of stoning, then, affirms that the judgment is God's; the application of stoning affirms the community's assent and participation in that judgment.[8]

C. Covenantal Hierarchy and Guilty Animals

"But if the ox were wont to push [gore] with his horn in time past, and it hath been testified to his owner, and he hath not kept him in, but that he hath killed a man or a woman; the ox shall be stoned, and his owner also shall be put to death." The owner had been warned that the beast was dangerous. (We shall consider in the next section what constitutes valid evidence of habitual goring.) He had withheld this information from the victim. How? By refusing to place adequate restraints on the beast. The victim had every reason to believe that the ox was fully domesticated, meaning that it was *self-disciplined* under the general authority of its owner. Again, it is *self-government under God's law* which is the crucial form of government.

The Bible is unique in establishing the judicial requirement of

8. James B. Jordan, *The Law of the Covenant: An Exposition of Exodus 21–23* (Tyler, Texas: Institute for Christian Economics, 1984), pp. 122–24.

self-government to beasts in general. Any beast is to be held accountable if it kills a human being. (Maimonides made one exception regarding a domesticated beast: it is not responsible if it kills a heathen, meaning a gentile.)[9] Since the days of Noah, they have had the fear of man placed in them by God (Gen. 9:2). A beast must somehow suppress this fear—an internal warning from God—in order to kill a man. Beasts are responsible creatures; they are to be hunted down and killed for this form of rebellion. Some domesticated beasts are responsible outward to other beasts, upward to man, and, through their masters, upward to God.[10]

The Bible deals with the liability problem by making owners personally responsible for the actions of their animals. If their animals cause no problems, there will be no penalties. The more dangerous the animals, the more risky the ownership. Clearly, Exodus 21:30 is a case-law application of a general principle regarding the responsibilities of ownership. The principle can be extended to ownership of other animals besides oxen, and also to related instances of personal financial liability for damages in cases not involving animals.

The law makes it clear that the owner may not profit in any way from the evil act of the beast. He is not permitted to salvage anything of value. The beast is stoned—the same death penalty that a guilty human would receive—and the owner does not receive the carcass. Its flesh may not be eaten (v. 28). The beast is treated as if it were a human being. Its evil act brings death—not the normal killing of oxen, which allows owners to eat the flesh or sell it to those who will, but the death of the guilty. The guilty beast is no longer part of the dominion covenant. It can no longer serve the economic purposes of men, except as an example. It has to be cut off in the midst of time, just as a murderer is to be cut off in the midst of time.

1. Why Stoning?

J. J. Finkelstein discussed at considerable length the question of the stoning of the ox. While similar laws regarding the goring ox are

9. "If an ox kills a person anywhere, whether an adult or a minor, a slave or a freeman, it incurs death by stoning whether it is innocuous or forewarned. However, if it kills a heathen, it is exempt in accordance with heathen law." Moses Maimonides, *The Book of Torts*, vol. 11 of *The Code of Maimonides*, 14 vols. (New Haven, Connecticut: Yale University Press, [1180] 1954), "Laws Concerning Damage by Chattels," I:X:1, p. 36.

10. The incomparable biblical example of upward responsibility of an animal toward man is Balaam's ass. "And the ass said unto Balaam, Am not I thine ass, upon which thou hast ridden ever since I was thine unto this day? Was I ever wont to do so unto thee? And he said, Nay" (Num. 22:30).

found in many ancient Near Eastern law codes, the Hebrew law was unique: it specifically required stoning of the ox that kills any human being, even a slave. Finkelstein concluded that this requirement testified to the ox's crime as being of a different order than the crime of its negligent owner. It pointed to *treason*, a rebellion against the cosmic order, a crime comparable to a Hebrew's enticing of a family member to worship foreign gods, which was also to be punished by stoning (Deut. 13:6–11). It was an offense against the whole community, and the whole community is therefore involved in the execution.

> The real crime of the ox is that by killing a human being—whether out of viciousness or by an involuntary motion—it has objectively committed a *de facto* insurrection against the hierarchic order established by Creation: Man was designated by God 'to rule over the fish of the sea, the fowl of the skies, the cattle, the earth, and all creatures that roam over the earth' (Gen. 1:26, 28). Simply by its behavior—and it is vital here to stress that intention is immaterial; the guilt is objective—the ox has, albeit involuntarily, performed an act whose effect amounts to "treason." It has acted against man, its superior in the hierarchy of Creation, as man acts against God when violating the Sabbath or when practicing idolatry. It is precisely for this reason that the flesh of the ox may not be consumed.[11]

Finkelstein traced this biblical law forward into the Middle Ages. In medieval Europe, trials for animals were actually held by the civil government. Defense lawyers in civil courts were hired at public expense to defend accused beasts. Witnesses were called. Guilty animals were destroyed as a civic judicial act. In some cases, they were publicly hanged.[12] Few people know about this side of European history, although specialized historians have known all along. Some of the great minds of Western philosophy, including Aquinas and Leibniz, attempted to explain this practice rationally.[13] Yet the specialized historians have generally remained silent, and few professional historians have ever heard of such goings-on, nor are they aware that in ancient Athens, the courts tried inanimate objects, such as statues that had fallen and killed someone. If convicted, the object was banished from the city.[14] Why the silence? Why don't these stories get into the text-

11. J. J. Finkelstein, *The Ox That Gored* (Philadelphia: American Philosophical Society, 1981), p. 28.

12. A painting of the hanging of a pig in Normandy in 1386 appears on the cover of the 1987 reprint of E. P. Evans's 1906 book, *The Criminal Prosecution and Capital Punishment of Animals* (London: Faber & Faber). The painting shows the pig dressed in a jacket.

13. Nicholas Humphrey, Foreword, *ibid.*, p. xviii.

14. W. W. Hyde, "The prosecution of animals and lifeless things in the middle ages

books? As Humphrey asked: "Why were we never told? Why were we taught so many dreary facts of history at school, *and not taught these?*"[15]

He answered his own question: modern historians can make little sense out of these facts. There seems to be no logical explanation for the way our ancestors treated guilty animals. What is a guilty animal, anyway—a legally convicted guilty animal? How can such events be explained? Finkelstein cited the theory of legal scholar Hans Kelsen that such a practice points to the "animism" of early medieval Europe, because to try an animal in court obviously points to a theory of the animal's possession of a soul.[16] Kelsen said that this reflects early Europe's older primitivism. Finkelstein then attacked Kelsen's naive approach to an understanding of this practice. In contrast to primitive societies, it is only in the West that such legal sanctions against offending animals have been enforced. "*Only* in Western society, or in societies based on the hierarchic classification of the phenomena of the universe that is biblical in its origins, do we see the curious practice of trying and executing animals as if they were human criminals."[17] Then he made a profound observation: "What Kelsen has misunderstood here —and in this he is typical of most Western commentators—is the sense, widespread in primitive societies (as, indeed in civilized societies of non-Western derivation), that the extra-human universe is *autonomous* and that this autonomy or integrity is a quality inherent in every species of thing."[18] Because Western society long denied such autonomy to the creation, it has in the past adhered to the biblical requirement of destroying killer animals; in Europe, they were even given a formal trial.

2. Expiation

What none of the scholars discusses is the need for expiation, a need which is both psychological and covenantal. The animal's owner and the community at large, through its representatives, must publicly disassociate themselves from the killer beast. They must demonstrate publicly that they in no way sanction the beast's murderous act. There is an Old Testament precedent for the need for this

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and modern times," *University of Pennsylvania Law Review* (1916). Finkelstein was somewhat suspicious of these accounts.

15. Humphrey, "Foreword," p. xv.

16. Finkelstein, *Ox That Gored*, p. 48. He cited Kelsen, *General Theory of Law and State* (1961), pp. 3–4.

17. Finkelstein, *op. cit.*, p. 48.

18. *Ibid.*, p. 51.

sort of formal expiation: the requirement in ancient Israel that civic officials sacrifice a heifer when they could not solve a murder that had taken place in a nearby field (Deut. 21:1–9). "So shalt thou put away the guilt of innocent blood from among you, when thou shalt do that which is right in the sight of the Lord" (v. 9). In New Testament times, we no longer need to sacrifice animals (Heb. 9, 10), but the need for formal procedures for the expiation of the crime of man-killing is still basic. To ignore this need is to unleash the furies of the human heart.

The medieval world understood this to some degree, however imperfectly; the modern humanistic West does not understand it at all, and seeks to deny it by abolishing any trace of such ritual practices. We cannot make sense of the so-called "primitive folk practices" of medieval and early modern Western history that dealt with this fundamental civic and personal need, and so we refuse even to discuss them in our history books. We execute murderers in private when we execute them at all. (In the state of Massachusetts in the early 1970s, the median jail term served by a murderer was under two and a half years.)[19] Humanist intellectuals seek to persuade the public that society is itself ritually guilty for maintaining the "barbarous" practice of capital punishment.

D. Personal Liability and Self-Discipline

The convicted owner of the habitually goring ox in Exodus 21:28 implicitly misinformed the ox's victim. He had known that the ox had been violent in the past, yet he did not take steps to restrain it. The beast was roaming around as if it had no prior record of violence. The victim did not recognize the danger involved in being near the beast.

The Bible does not reveal in these passages regarding goring oxen the evidence that constituted judicially binding prior knowledge. What kind of information did the owner have to possess in order for the court to declare him guilty? The rabbinical specialists in Jewish law said that the animal had to have gored someone or other animals on three occasions before the owner became personally liable.[20]

1. Maimonides' Exposition

Maimonides spelled it out in even greater detail: any domesticated animal must first kill three heathen (gentiles), plus one Israelite; or

19. James Q. Wilson, *Thinking About Crime* (New York: Basic Books, 1974), p. 186.
20. Albeck, *Jewish Law*, col. 322.

kill three fatally ill Israelites, plus one in good health; or kill three people at one time, or kill three animals at one time.[21]

This is an excessive number of prior infractions in order to activate capital sanctions. Subsequent victims need more protection than these Talmudic rules would provide. It is far more reasonable to conclude that a single prior conviction should suffice to identify the beast as dangerous. What should be obvious in any study of traditional Rabbinic laws regarding killer oxen is the extent to which the rabbis would go in order to exempt the owners. Maimonides's example is remarkable, found in Chapter 10 of the first treatise on torts, "Laws Concerning Damage by Chattels."

> 11. No owner need pay ransom unless his animal kills outside his premises. But if it kills on his premises, then although it is liable for stoning, the owner is exempt from paying ransom. Thus if one enters a privately owned courtyard without the owner's permission—even if he enters to collect wages or a debt from the owner—and the householder's ox gores him and he dies, the ox must be stoned, but the owner is exempt from paying ransom since the victim had no right to enter another's premises without the owner's consent.
>
> 12. If one stands at the entrance and calls to the householder, and the householder answers, "Yes," and he then enters and is gored by the householder's ox and dies, the owner is exempt, for "Yes" means no more than "Stay where you are until I speak to you."[22]

He even exempted the owner of a notorious ox that has gored a pregnant woman whose child is born prematurely. "For Scripture imposes liability to pay the value of such infants on humans only."[23] Because the ox did it, and is not a human, its owner is exempt; the transfer of liability upward to the owner is cut short, because the ox cannot be held responsible. He did admit that if the ox gores a pregnant bondwoman, and the same thing happens, the owner is financially liable in this case, "for this is as if the ox gored a she-ass about to foal."[24] Oxen are responsible for damaging other animals, so this responsibility is transferred upward to owners, unlike the previous case.

On the other hand, Maimonides was very hard on the animal associates of a condemned criminal ox. "If its trial has been concluded and it then becomes mixed with other oxen—even with a thousand

21. Maimonides, *Torts*, "Laws Concerning Damage by Chattels," I:X:3, p. 36.
22. *Ibid.*, I:X:12, pp. 38–39.
23. *Ibid.*, I:XI:3, p. 40.
24. *Ibid.*, I:XI:4.

others—all must be stoned and buried and are forbidden for use, as is the rule concerning any animal condemned to be stoned."[25] Owners of friendly oxen were forewarned by Maimonides: don't let your law-abiding beasts fall in with bad company![26] (After reading Maimonides's *Code* in detail, this gentile begins to suspect that pre-modern Rabbinic reasoning regarding the case laws is very different from his own.)

2. Re-Sold Ox

We know that an ox that had gored another ox had to be sold by its owner to a third party (Ex. 21:35). Thus, to be the owner of an ox that had been convicted of goring, he would have had to go out and repurchase the offending ox, or else he is the person who bought the offending ox. In either case, he had taken active steps to buy a known offender. To have done this, and then to have refused to take active measures to restrain it, should make him legally vulnerable to the charge of negligence.

Would other evidence rather than a prior conviction be a sufficient warning? What if neighbors had reported the beast to the authorities? If the authorities had issued a formal warning to the owner, would this serve as evidence of its status as a habitual offender? If we answer yes, then this raises the issue of "innocent until proven guilty." There had been no proven evidence against the beast. Perhaps neighbors were hostile to the ox's owner, and reported false information. On the other hand, perhaps they were telling the truth, and the owner was negligent in not taking steps to restrain the ox.

The easiest way to resolve the issue is to rely on the biblical principle of the double witness (Deut. 17:6). If two different witnesses each reports a different infraction—neither of the infractions had a double witness—then the authorities must issue a warning to the owner. This formal warning can then serve as evidence in a future trial.

25. *Ibid.*, XI:10, p. 41.

26. What Maimonides and the rabbis failed to understand is this: the guilt of a murderous animal is covenantal, not metaphysical. The evil that the animal has committed is not passed to other animals by mere physical contact or proximity. The evil act of the animal was rebellion against the fear of man that God places in every animal's heart (Gen. 9:2). It had trespassed the moral boundaries that God placed in its heart. Maimonides was more concerned about the boundary between the convicted animal and other animals than with the boundary inside the animal between it and mankind, and the physical boundary between the animal and his last three human victims.

3. David Daube's Judicial Subjectivism

David Daube, dazzled by the legerdemain of biblical higher criticism, argued that this law was written much earlier than the law in Exodus 21:35–36. He argued that there was a strict rule of evidence in this instance: a formal warning given to the owner of the ox. "This means that the judge need not examine whether or not you were really clear on the point—which might be difficult for him to discover. He need only examine whether or not the necessary announcement was made to you—a very easy thing to find out. If the announcement was made, you are responsible for everything that has happened since; and it would be no excuse to say that you personally had not believed that the ox was so savage. If no announcement was made, you are not responsible even if you yourself had seen all the time how dangerous the ox was."[27] The decision of the judge is to be made "on a strict, archaic, 'objective' kind of proof," Daube said. Notice his characterization of objective proof as archaic. He contrasted this supposedly archaic legal rule with a supposedly more advanced rule of law that governed the supposedly later law of Exodus 21:35–36.

> The judge does not raise the freer, more advanced, "subjective" question: Did you or did you not know about the nature of the ox? Now in the other, later paragraph, on the case where your ox kills an ox, we do get this "subjective" element. No mention is here made of the necessity of a formal announcement: the responsibility is yours from the moment you are aware, or should be aware, that your ox is not to be trusted. At this more advanced stage of the law, the judge must investigate the affair much more closely; he must, above all, search men's hearts. If he reaches the conclusion that you knew the beast was dangerous, he will find you guilty even though no announcement was ever made to you in the matter.[28]

Daube did not discuss the differing criteria of evidence in terms of the differing impact of the crime and differences in the resulting liability: the death of a human being vs. the death of someone else's ox. He failed to recognize that the formal criteria that govern evidence of liability in the case of an ox that kills another ox are less rigorous, because the crime is less damaging. In a case of an ox that slays another ox, biblical law does not require that a formal warning be given by the authorities to the owner; prior general knowledge is sufficient to convict: "Or if it be known that the ox hath used to push [gore] in

27. David Daube, *Studies in Biblical Law* (Cambridge: At the University Press, 1947), p. 87.

28. *Ibid.*

time past, and his owner hath not kept him in; he shall surely pay ox for ox; and the dead shall be his own" (Ex. 21:36). *Public knowledge rather than a formal complaint to the civil authorities is sufficient to convict the owner in this instance*. It can be safely assumed by the judge that if the public knew about the beast's habits, then the owner must have known. In contrast, the potential liability of the owner is far greater when an ox kills a human being. It is too dangerous to allow the judge to make his ruling in terms of the assumption of general knowledge. By requiring more rigorous standards of evidence, biblical law restrains the discretionary authority of the state's representative in the more serious cases of negligence. This restrains the state.

Daube ignored this explanation in order to argue that the later rule was chronologically later in Israel rather than merely later in the biblical text. He also argued that the later rule was governed by a more mature concept of legality, a legal development that allows the judge to search the hearts of the disputants. He is a faithful representative of contemporary humanism: a man who weakens men's confidence in the integrity of God's revealed word and the reliability of His law, and thereby strengthens the arbitrary power of the state.

Daube's view of the state is the modern humanist's view: the state as an agency that possesses the judicial authority and obligation to search men's hearts, and to render formal judgment in terms of its findings. This view of state power asserts that the state possesses an ability that only God possesses: the ability to know man's heart. The prophet Jeremiah asked rhetorically: "The heart is deceitful above all things, and desperately wicked: who can know it?" (Jer. 17:9). His answer was clear: "I the Lord search the heart, I try the reins, even to give every man according to his ways, and according to the fruit of his doings" (Jer. 17:10). The human judge can make causal connections based on public evidence, but he cannot search the defendant's heart. Any assertion to the contrary necessarily involves an attempt to divinize man, and in all likelihood, divinize man's major judicial representative, the state.

4. The Economics of Negligence

We know from the text that the ox's owner had been warned about the dangerous ox, yet he did nothing visibly to restrain it. Why would an owner neglect a warning from someone else regarding the threat of his ox to others? There are several possible reasons. First, he may not trust the judgment of the person bringing the warning. The beast may

behave quite well in the owner's presence. Is he to trust the judgment of a stranger, and not trust his own personal experience? But once the warning is delivered, he is in jeopardy. If the beast injures someone, and the informant announces publicly that he had warned the owner, the owner becomes legally liable for the victim's suffering.[29]

Second, the owner may be a procrastinator. He fully intended to place restraints on the ox, but he just never got around to it. This does not absolve him from full personal liability, but it does explain why he failed to take effective action.

Another reason for not restraining the ox is economics. It takes extra care and cost to keep an unruly beast under control. For example, over and over in colonial America, town records reveal that owners of pigs, sheep, and cattle had disobeyed previous legislation requiring them to pen the beasts in or put rings in their noses. Apparently, the authorities were unable to gain compliance, for this complaint was continual and widespread throughout the seventeenth century.[30] The costs of supervising the animals or maintaining fences in good repair were just too high in the opinion of countless owners. Even putting a ring in the beasts' noses, making it easier for others to put a rope through the ring and pull a beast home or to some other location, was simply too much trouble.[31] Boston imposed stiff fines on the owners of wandering animals, which helped to reduce the problem.[32]

In one case, the unwillingness or inability of a woman to control her wandering pig literally changed the political history of the United States. Litigation over the ownership of a wandering pig between Goodwoman ("Goodie") Sherman and the well-to-do Boston merchant, Robert Keayne, led in 1644 to a deadlock in the General Court (legislature) of Massachusetts between the deputies, who were direct representatives of the people (who favored Sherman), and the magistrates (who favored Keayne). The result was the division of the two groups into separate legislative houses—the origin of bicameral-

29. Because a serious penalty could be imposed on the liable owner, the informant would have to have proof that he had, in fact, actually warned the owner of the beast's prior misconduct. Otherwise, the perjured testimony of one man could ruin the owner of a previously safe beast which then injured someone.

30. Carl Bridenbaugh, *Cities in the Wilderness: The First Century of Urban Life in America, 1625–1742* (New York: Capricorn, [1938] 1964), pp. 19, 167, 323.

31. In my research on my doctoral dissertation on colonial American Puritanism, I came across no case where an owner was executed for the act of his beast, nor do I recall locating an example where heavy restitution was paid to a victim.

32. Bridenbaugh, *Cities in the Wilderness*, p. 168.

ism in America.[33] As Bridenbaugh noted, "The frequency with which the hog appears in town records is mute proof that despite many 'good and sufficient' measures the problem was never solved, and the bicameral legislature of Massachusetts remains a monument to its persistence."[34] Passing laws is not sufficient. Sanctions must be imposed that alter human behavior.

E. Limited Liability

The Bible imposes liability on owners of animals known to be dangerous. Penalties are imposed that vary according to the nature of the infraction and the degree of prior knowledge by the owner. These penalties are intended to reduce uncertainty about potentially violent beasts. By extending the principle of legal liability, we can derive principles of liability for owners of inanimate objects.

Man is a limited creature. His knowledge is therefore limited. Because his knowledge is limited, God limits man's legal liability. Man is not to be judged by standards that could apply justly only to an omniscient being. If a state seeks to impose perfectionist standards of liability, the legal system will cease to function. It will begin to produce unjust decisions, and there will be an increase of uncertainty and also an increase of arbitrary decisions—precisely what biblical law is designed to prevent. Such judicial uncertainty would make economic decision-making prohibitively expensive. The economy would be threatened.

Consider the case of a potentially dangerous beast that broke its rope or knocked down a restraining fence in Old Testament Israel. The owner would be in the same position as a man who was using an axe which he thought was safe. The axe head flew off and killed someone. This was a case of accidental manslaughter. Immediately, the man would have fled to a city of refuge, in order to escape the dead man's avenger of blood. At that point, the avenger of blood would have demanded a trial, and the elders of the city would have held it. If judged guilty of premeditated murder, the guilty man would have been de-

33. On the "sow" incident, see Charles M. Andrews, *The Colonial Period of American History*, 4 vols., *The Settlements* (New Haven, Connecticut: Yale University Press, [1934] 1964), I, pp. 450–51. Cf. Gov. John Winthrop, *Winthrop's Journal: "History of New England," 1630–1649*, ed. James Kendall Hosmer, 2 vols. (New York: Barnes & Noble, [1908] 1966), II, pp. 64–66, 120–21.

34. Bridenbaugh, *Cities in the Wilderness*, p. 19. I put a question mark in the margin of my book upon first reading it. I had not yet heard of the Keayne-Sherman conflict, and Bridenbaugh never explained what he meant. Scholars can sometimes be too cryptic.

livered up to the avenger. If judged innocent, he would have had to remain in the city until the death of the high priest (Num. 35:22–28).

1. A Broken Rope

Consider the dangerous beast in our day. It breaks its restraining rope and kills someone. The victim's heirs sue the owner. They argue that the owner should have used a more sturdy rope. If convicted, the owner then has to prove that the rope's manufacturer was the true culprit. The court then investigates the rope manufacturer. Should he be held liable? To defend himself, he charges the hemp growers with selling a substandard product. Each stage in the case gets more technical and more expensive. The quest for perfect justice is suicidal. It increases the costs of litigation to such an extent that real victims cannot ever afford to attain restitution, for the case never ends. The courts become clogged with expensive cases that can never be resolved by anyone other than God. Only the lawyers profit. God's law does not exist in order to create employment for lawyers.

A state that attempts to impose standards of personal responsibility that imply omniscience and omnipotence will eventually make life impossible. Sometime before civilization grinds to a strangled halt, however, the bureaucrats will back down or else there will be a revolution which removes these messianic standards of personal and corporate responsibility from the law books. The price of perfect liability laws, like the price of perfect justice, or the price of a risk-free society, is death.[35] Such justice will be available only at the end of history. At that point, it will not only be available, it will be inescapable.

This passage therefore has implications for the concept so popular in modern economies, that of *limited liability*. The modern corporation is protected by limited liability laws. In case of its bankruptcy, creditors cannot collect anything from the owners of the corporation's shares of ownership. The corporation is liable only to the extent of its separate, corporate assets.

2. Legitimate Limitations

Certain kinds of economic transactions that limit the liability of either party, should one of them go bankrupt, are valid. For example,

35. It should be understood that the selection of "socially appropriate risk" is like any other selection process: it involves subjective valuation and "aggregation" through politics and market forces of the "socially appropriate" mixture of risk and productivity. See Mary Douglas and Aaron Wildavsky, *Risk and Culture: An Essay on the Selection of Technological and Environmental Dangers* (Berkeley: University of California Press, 1982).

a bank that makes a loan to a church to construct a building cannot collect payment from individual members, should the church be unable to meet its financial obligations. It can repossess the building, of course, something that few banks relish doing. It is bad publicity, and a church building is a kind of white elephant in the real estate world: only churches buy them, and almost all of them are short of funds. This is why bankers prefer to avoid making loans to churches, other things being even remotely equal.[36]

The same sorts of limited liability arrangements ought to be legally valid for other kinds of associations, including profit-seeking corporations,[37] limited partnerships, or other private citizens who can get other economic actors to agree voluntarily to some sort of limited liability arrangement. For example, a "daredevil" who accepts a very dangerous job, such as putting out an oil well fire, is probably willing to release his employer from all legal damages in case he gets killed. He is paid more than a normal wage for his services in order to compensate him for the risk. A normally dangerous job, such as uranium mining or handling radioactive substances, may carry with it an economic obligation to release the employer from any responsibility for injury or death. The very existence of the danger keeps other workers from applying, thereby lowering the competition and keeping economic wages higher than would have been the case, had the job been safe. The laborer is compensated fairly. He gets more money for being willing to bear greater risk. Without the limited liability provision, the employer might not be willing to employ anyone. The dominion assignment might not be completed in this field until some new technological development reduces risk. Some tasks in life

36. A wise banker would recommend to the church's officers that church members refinance their homes or assume debt using other forms of collateral, and then donate the borrowed money to the church. This ties the loans to personal collateral that a banker can repossess without appearing to be heartless. It makes church members personally responsible for repayment. (Co-signed notes are also acceptable from the banker's point of view, but questionable biblically: e.g., prohibitions against "surety.") Members cannot escape their former financial promises by walking away from the church. It also keeps the church out of debt as an institution, which is godly testimony concerning the evil of debt (Rom. 13:8a).

37. Robert Hessen, *In Defense of the Corporation* (Stanford, California: Hoover Institution, 1979). I disagree with R. J. Rushdoony's condemnation of limited liability. See Rushdoony, *Politics of Guilt and Pity* (Vallecito, California: Ross House, [1970] 1995), Part III, ch. 8. What persuaded me that he was incorrect here was a careful consideration of the legal implications of the imposition of unlimited personal liability of church members for the decisions of pastors and church officers. Could the church function if every member were made potentially liable to the limits of his capital for the illegal activity of the church's officers?

cannot be actuarially insured at a profit, but this does not mean that they should not be performed by people who are aware of the risks and who agree to "self-insure" themselves.[38]

3. Other Cases

On the other hand, consider the case of citizens who once lived near an atomic bomb test site. They were assured by government officials (who were presumed to be knowledgeable and therefore were legally responsible) that there were no excessive risks involved in remaining where they were, when there is evidence that these officials knew or should have known about the risks. The citizens who sustain long-term radiation-related injuries as a result of the explosion have every reason to sue and collect from the federal government, even if those officials cannot be located today, or are dead. It is the policy of deliberate misinformation ("disinformation") concerning risks which is the issue. The civil government cannot escape these responsibilities. "I was just following orders," is no excuse for some bureaucrat's deliberately misinforming the civilian victims.

There are other cases that are more difficult to assess. A chemical firm buries toxic wastes. It uses means that are at the time of burial believed to be safe by private health experts or government health officials—people whose tasks are part of the quarantine function of the civil government (cf. Lev. 13, 14).[39] The firm's managers have not deliberately misinformed anyone. Neither have public health officials. They acted with good intentions to the best of their ability, according to the best technical knowledge generally available at the time of the decision. They are like a man who ties up a dangerous beast with a rope generally believed to meet standards of strength, but which snaps unexpectedly, allowing the beast to escape and injure or kill

38. After the fatal explosion of the launch vehicle of the Challenger space shuttle in January of 1986, it was revealed that the seven military-employed "astronauts" had been required by the government to forego all but minimal life insurance benefits as a condition of participating in the launch. The one civilian, a school teacher, had been given anonymously a one-trip life insurance policy for a million dollars, insured by Lloyd's of London. Months later, the heirs of four of the astronauts received payments totaling $7.7 million, or about $1.9 million per family. (Median income for a family was around $23,000) The federal government paid 40% of this, and the firm that constructed the rocket paid 60%. This was a political decision; the actual figures paid were kept secret by the government, and only became public 15 months later when legal action was taken by seven news organizations. *New York Times* (March 8, 1988).

39. Gary North, *Boundaries and Dominion: An Economic Commentary on Leviticus*, 2nd ed. (Dallas, Georgia: Point Five Press, [1994] 2012), ch. 9.

someone.[40] Men are limited creatures; they cannot be held to be liable for every unforeseen act. This was also the conclusion of the rabbinical experts of Jewish law.[41]

F. "Ransom" Insurance

The Bible provides only one explicit example of a capital crime that can be punished either by execution or a fine: this one. Murder has to be punished by the death penalty (Num. 35:31). In this case, the ox is executed, so the general principle of "life for life" is maintained. Genesis 9:4–6 is not violated by Exodus 21:28–30. The owner, because he is not directly guilty of committing a capital crime, although fully responsible before the law for the actions of his beast, can escape execution. It is not stated that the judges make this decision: death or restitution. The victim's family probably makes this decision. Perhaps both judges and family do.[42] Restitution is owed to the relatives, as heirs of his estate; legally, the payment is made to the dead victim. The economic incentive of the family is clear: money is more useful than the death of the ox's owner.

The restitution payment normally would be high. A man has to pay. There is no escape. If he cannot pay what is demanded, either through liability insurance, personal capital, or selling himself into slavery, then he dies. Restitution is mandatory.

1. Liability Insurance

The development of personal liability insurance is one way that Western society has dealt with the problem of the catastrophic judgment. The question arises: Should *criminal negligence* be covered? The civil government must face the questions raised by economic analysis. If the criminal is criminally negligent, yet covered by liability insurance, can the insurance firm be forced by law to pay, even if its contract with the convicted person says that it must? Is a third-party payment to the victim in the name of the criminal an immoral contract and therefore illegal? Does it reduce the economic threat of personal bankruptcy to such an extent that criminal negligence is thereby subsidized? Is criminal negligence a legitimate event to insure against?

40. Chapter 52.

41. Wrote Shalom Albeck: "The foreseeability test as the basis of liability for damage led the rabbis to conclude that even where negligent the tortfeaser would only be liable for damage that he could foresee." *Principles of Jewish Law*, col. 322.

42. Finkelstein, *Ox That Gored*, p. 29.

Should such contracts be made illegal—not just unenforceable in a court of law, but illegal?

There is another problem. If the "deeper pocket" of the insurance company is available for the victim's family to reach into, will they demand "all the traffic will bear," irrespective of justice? If the owner were not insured, would the victim's family ever demand such a high restitution payment? In the absence of insurance, the victim's heirs would probably have to limit their demands. Question: Should judgments be based on the merits of the case or the "depth of the pocket" of the insurance company?

2. Limiting the Insurer's Liability

To sell personal liability policies, insurance companies have to limit their liability. They do so by placing maximum monetary limits on all pay-outs. They also limit their liability by insuring people who have reputations for being reliable. High-risk buyers raise the premiums that low-risk buyers are forced to pay. There is an economic incentive for companies to seek out lower-risk buyers for any given type of policy. They can insure a special class of higher-risk people, but only by charging all members high premiums. Eventually, they run out of volume sales when they seek out more and more high-risk buyers. They eventually stop selling policies to the highest-risk people.

Personal liability insurance, to be profitable, must be sold to a *particular class* of insurable people. The very concept of "insurable class" refers to a group of people to whom the actuarial laws of probability apply. Groups to which these laws do not apply cannot be safely and profitably insured by private firms selling voluntary policies. Thus, insurance companies attempt to sell to people who are members of a large, insurable class.[43] Insurance firms limit their risk by enlarging the number of policy buyers within a particular large class. They do not want to be bankrupted by one or two large settlements; to avoid bankruptcy, they must sell large numbers of policies. The larger the number of policy holders, the closer the "fit" between the actuarial laws—"laws of large numbers"—and the actual number of cases in which the company must pay victims of negligence.

Liability insurance therefore will cover occasional cases of criminal negligence, for any given policy holder may occasionally be criminally negligent. For example, personal liability coverage on automo-

43. Ludwig von Mises, *Human Action: A Treatise on Economics* (New Haven, Connecticut: Yale University Press, 1949), pp. 107–9.

bile drivers covers those rare cases in which a driver may be criminally negligent.[44] But the firms will not insure people who have received numerous traffic tickets for speeding, and especially for drunk driving. It is true that high-risk drivers can purchase automobile and liability insurance, but only because state governments require the auto insurance industry to set up high-risk pools for otherwise uninsurable drivers do the companies sell policies to these people. *Today's civil governments are requiring private firms to insure people who are more likely to be regarded by the courts as criminally negligent*. These laws reduce political pressures from those classified as criminally negligent; they continue to be allowed to drive. The states also avoid having to set up taxpayer-financed insurance programs for the high-risk drivers—programs that might bring complaints from low-risk drivers who also vote. The legislators require all drivers to carry personal liability policies—"ransoms for lives"—but they also require insurance companies to sell high-risk drivers this coverage.

If the legal system did not compel the purchase of auto insurance, or strongly encourage it by requiring visible evidence of a driver's ability to self-insure himself, the insurance firms would be trapped. They could not easily pass on to low-risk drivers the added costs of insuring high-risk people. Low-risk drivers are forced by the state to pay higher premiums for their policies than would have been the case had the high-risk drivers been refused coverage and thereby forced off the roads. Without this compulsion, they would not purchase the policies. The companies would then suffer losses because of the reduced sales. In fact, they do suffer some losses; some buyers drop coverage and drive illegally. The sellers cannot pass on all the additional costs to buyers.[45]

Thus, the concern about criminals' being able to escape justice because of private insurance contracts is misplaced. The greater problem is the civil government's demand that people who are more likely to be convicted of negligence be covered by insurance, whether or not

44. Some policies may exclude such coverage. It is in the self-interest of policy-buyers to read the fine print of their insurance contracts before they buy.

45. Part of these costs are passed on to uninsured or under-insured drivers who would have liked the coverage but who cannot afford the higher premiums. Also, the company's shareholders bear some of these costs. They suffer capital losses because the companies cannot sell policies to all those who would be willing to buy policies if the costs were lower. It is erroneous to argue that higher costs can be passed on to customers indiscriminately or at zero cost to companies. See Murray N. Rothbard, *Power and Market: Government and the Market Economy*, 4th ed. (Auburn, Alabama: Mises Institute, [1970] 2006), pp. 110–16.

they are insurable by private firms on a voluntary basis. It is not that the state *allows* insurance companies to pay "ransoms for the lives" of negligent people; it is rather that the state *compels* private firms to sell such coverage to people or firms that are more likely to be convicted of negligence.

G. The State as Insurer

The state even enters as the "insurer of last resort" when no private firms will insure extremely high-risk people or industries. One example in the United States—which is common in Western industrial nations, though not in Japan[46]—is the government-guaranteed coverage for accidents connected with nuclear power plants. Power companies are government-licensed public utilities that possess regional monopolies. The "Price-Anderson" legislation of the 1957 set relatively low ceilings for financial liability by such firms-$560 million per accident.[47] The federal government collects the premium money. In 2010, this limit was $375 million to be covered by the plant's insurance. The company has to insure the next $112 million. The purchasing power of the dollar in 2010 was approximately eight times less than in 1957. Above this payout, the industry must insure $10 billion. Anything above this will be covered by the Federal government. Because of this federal legislation, public utilities were able to expand the use of nuclear power generation. In this sense, today's nuclear power industry has not been the product of a free market economy; it has been the product of special-interest legislation in the form of liability maximums and compulsory state insurance coverage.[48]

46. H. Peter Metzger, *The Atomic Power Establishment* (New York: Simon & Schuster, 1972), p. 218.

47. *Idem*.

48. Anti-nuclear power advocates tend to be anti-free market, and usually blame the free market for the nuclear power industry. Nuclear power proponents usually are pro-free market, so they seldom talk about the statist nature of the subsidy. But when the chips are down, the pro-nuclear power people accept federal subsidies to their program as being economically and ideologically valid. Wrote nuclear power advocate Petr Beckman: "Yes, the American taxpayer has paid $1 billion to research nuclear safety, and I consider that a good investment. . . ." Beckman, *The Health Hazards of NOT Going Nuclear* (Boulder, Colorado: Golem Press, 1976), p. 154. He also argued that the Price-Anderson insurance program makes money for the federal government because power companies pay premiums to Washington, along with money sent to private insurance pools. "You call that a subsidy?" he asks rhetorically (p. 156). Of course it is a subsidy. The premium rates are far below market rates, even assuming private firms would insure against a nuclear power plant disaster, which is doubtful. The maximum liability is fixed by law far below what would be demanded in a court if some major nuclear accident took place in a populated area. This is why the Price-Anderson leg-

Liability insurance is another example of a free market, scientific development that protects the victims without bankrupting those who are personally responsible. The victims receive more money than the private, uninsured citizen or firm would otherwise have been able to pay. The lifetime income loss suffered by the family of the victim is compensated by the insurance company. The negligent person still could be executed, should the plaintiffs desire it, but it is far more likely that they would prefer to accept money from the insurance firm. The "ransom for a life" is higher; thus, the guilty person is more likely to survive. This extends the dominion covenant; the victim's family carries on, but the guilty man suffers no loss of capital, except possibly his ability to buy insurance subsequently.

Does the state have a biblically sanctioned right to compel people to buy liability insurance or else proof of sufficient capital to make restitution? In the case of drivers' liability insurance, where death and serious injury to innocent parties are common, and the drivers are using the state's highway system, the answer is yes. The state can establish rules and regulations for drivers who wish to qualify to use its highways. One of these regulations is liability insurance. Another requirement might be an annual auto safety inspection.[49] The automobile is like a large beast; if it becomes dangerous through neglect by its owner, innocent people can be killed. Insurance companies can be used as screening agents. They may be able write cheaper policies for those who drive inspected automobiles.

Other forms of liability insurance should not be mandatory, unless the situation is comparable to the "dangerous beast in a state-owned place" analogy, but civil government should recognize the legitimacy of the victim's heirs to call for the execution of the criminally negligent party. This would encourage people to buy sufficiently large personal liability insurance policies so that the victim's heirs would have a strong financial incentive to allow the guilty man to live.

islation was enacted in the first place: to subsidize the power industry by reducing its legal liability and its insurance rates.

49. This assumes that there is statistically valid evidence that state-mandated auto inspections do in fact reduce accidents and injuries. This evidence is frequently unclear. What *is* clear is that such legislation provides an initial increase in the net worth of those who are granted the licenses to perform these inspections, and that a continuation of such laws brings a stream of rents to those who possess these licenses.

H. The Goring of a Slave or a Child

"If the ox shall push [gore] a manservant or a maidservant; he shall give unto their master thirty shekels of silver, and the ox shall be stoned" (Ex. 21:32). Normally, the death penalty could be imposed on the owner of the ox. In this case, however, the penalty was fixed by law: 30 shekels of silver.

The wording here is peculiar. To "push" means, in this instance, to kill. In verse 29, "push" did not mean to kill. "But if the ox were wont to push with his horn in time past, and it hath been testified to his owner, and he hath not kept him in. . . ." Had "to push" meant "to kill," the ox would have been executed upon conviction. An ox that killed someone was stoned to death (v. 28). Thus, "push" in verse 29 had to mean something other than killing. But with respect to servants, the word "push" or "gore" is used in the sense of "gore to death." This is why the ox is executed: a human being has died.

Why the comparatively small penalty?[50] Why is the death of a servant dealt with less severely? Because the servant's owner has not suffered a loss comparable to the loss suffered by the heirs of a free man or woman. He has lost part of an investment in human capital—one which he would have had to part with after a set term of years. He has not suffered the loss of a relative. The primary issue is covenantal. The owner has not suffered a covenantal loss; he has suffered only an economic loss. He is not entitled to place penalties on the owner of the goring ox larger than the economic penalty specified by law.

1. Slave

If a male bondservant had brought a wife and children into the household of the owner, they would now go free, which serves them as a form of compensation. The master would have recouped his investment from the owner of the ox, thereby freeing the slave's heirs from further service.

What if the deceased bondservant had married after becoming a bondservant? In this instance, the heirs probably would have had the option of either remaining as servants in the owner's household or going free. Whether they would go free or not would depend on the size of the penalty payment to the bondservant's owner, compared to what he had paid for the bondservant. If the death occurred shortly before the bondservant was to have gone free, then the penalty payment

50. Thirty pieces of silver were a lot of money in terms of what they could buy, but not compared to what the victim's heirs could normally impose.

would have constituted an overpayment, and the extra money probably would have functioned as a release price for the wife and children of the bondservant. But if the penalty payment was approximately what the owner had spent to pay off the bondservant's debt—the original cause of his going into slavery—then the bondservant's family would have remained with the owner, as specified in Exodus 21:4.

An interesting connection can be seen between the death of Christ on the cross and the death of the gored servant. Jordan commented on this connection:

> As we have seen, our Lord Jesus Christ was born into the world as a homeborn slave-son, for His incarnation was His ear's circumcision. On the cross, he was made sin for us, and thus came under condemnation of death. He became an abject slave, that we might be elevated into the status of adopted slave-sons. He was killed by the wild beasts, the lions of paganism, and the apostate unclean goring bulls of Israel: "Many bulls have surrounded Me; strong ones from Bashan have encircled me. They open wide their mouth at me, as a ravening and a roaring lion. . . . Save Me from the lion's mouth; and from the horns of the wild oxen Thou dost answer Me" (Ps. 22:12, 13, 21). Thus, the price given for Christ's death was the price of the gored slave, thirty pieces of silver (Matt. 26:15). At His resurrection, however, our Lord overcame the bulls and trampled on the silver for which He was sold: "Rebuke the beasts of the reeds, the herd of bulls with the calves of the peoples, trampling under foot the pieces of silver; He has scattered the people who delight in war" (Ps. 68:30). Thus, Judas found no joy in his silver, and it was used to buy a burying field for dead strangers, pagans destroyed by the wrath of God (Matt. 27:2–10).[51]

2. The Goring of a Child

"Whether he have gored a son, or have gored a daughter, according to this judgment shall it be done unto him" (Ex. 21:31). This is an important biblical principle: the imposition of a fine rather than the execution of the ox's owner or his child (a pagan practice of the ancient Near East). The Bible places this example under the general rule that allows the substitution of a fine for the death of the owner. This means that the evil practice of the ancient Near East, killing a man's child if he kills another man's child, is prohibited.[52] The Hammurabi Code specified: "If a builder constructed a house for a seignior, but did not make his work strong, with the result that the house which he built collapsed and so has caused the death of the owner of the house,

51. Jordan, *Law of the Covenant*, pp. 127–28.
52. Dale Patrick, *Old Testament Law* (Atlanta, Georgia: John Knox Press, 1985), p. 78.

that builder shall be put to death. If it has caused the death of a son of the owner of the house, they shall put the son of that builder to death."[53] This sharp difference from Babylonian law would appear to be an application of the principle of Deuteronomy 24:16: "The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers: every man shall be put to death for his own sin."

Conclusion

The Bible establishes the principle of cosmic personalism as the foundation of the universe.[54] There is no way that men can escape their responsibilities before God. Because biblical law recognizes this principle, it establishes the judicial principle of restitution to victims by the negligent. The general rule is: an eye for an eye, a life for a life.

The Bible affirms the principle of limited liability before men. The state is not God. It cannot know every aspect of historical causation. Neither can men. The state therefore cannot lawfully impose unlimited liability on those convicted of negligence, irrespective of their knowledge, decisions, and contractual arrangements.

In this unique instance, the case of a dangerous ox that kills a person, the guilty owner can legitimately escape death, though his beast cannot, because the victim's heirs are allowed to impose an economic restitution payment on the negligent individual. This law of criminal negligence is much broader than simply oxen and owners; it applies to all cases of death to innocent parties that are the result of negligence on the part of owners of notorious beasts or notorious machinery—capital that is known to be risky to innocent bystanders. Automobiles, trucks, certain kinds of occupations, nuclear power plants, coal mines, and similar examples of dangerous tools are covered by this general principle of personal liability.

This law should not be understood as applying to workers who voluntarily work in dangerous callings and who have been warned in advance of the risks by their employers, nor should it be used as a justification for the creation of a messianic state that attempts to discover criminal negligence in every case of third-party injury, despite the lack of knowledge of risks by the owners or experts in the field.

53. Code Hammurabi, paragraphs 229–30. *Ancient Near Eastern Texts Relating to the Old Testament*, ed. James B. Pritchard, 3rd ed. (Princeton, New Jersey: Princeton University Press, 1969), p. 176.

54. North, *Sovereignty and Dominion*, ch. 1.

Personal liability insurance is a development of the West that allows criminally negligent people a greater opportunity to escape the death penalty by means of high payments to the heirs of their victims. Purchasing such insurance is not to become mandatory, except in cases related to the use of state-financed capital (e.g., highways). Nevertheless, the risk is so high—execution—and the cost of premiums so low in comparison to the risk, that personal liability coverage is available to most people. Only the very poor, who would not normally own "oxen" (expensive capital equipment), or people convicted repeatedly of criminal negligence or actions that would lead to convictions for criminal negligence (e.g., drunk driving), or people who manage or own businesses that create high risks for innocent bystanders, would normally be excluded from the purchase of such insurance coverage. They would have to learn to handle their "oxen" with care.

41

THE UNCOVERED PIT

And if a man shall open a pit, or if a man shall dig a pit, and not cover it, and an ox or an ass fall therein; the owner of the pit shall make it good, and give money unto the owner of them; and the dead beast shall be his.

EXODUS 21:33–34

The theocentric principle here is God's ownership of the world. He has delegated temporary ownership of the portions of world to individuals, families, and institutions. An owner of one piece of land is not to extend his dominion over his portion of the allocated capital at the expense of another person's property. To do so is an attempt to profit at someone else's expense.

Here is another variation of the restitution principle. A man digs a pit for some reason, and fails to cover it. This is negligent behavior. He knows that unsuspecting people or animals could fall into the pit and be harmed. His failure to go to the expense of covering the pit is an example of what economists call "externalities." He imposes the risk of an injured beast on the owner of the beast. *By saving time and money in not covering the pit, he thereby transfers the economic burden of risk to someone else*. This is a form of theft. Someone who cannot benefit from the use of the pit is expected to pay a portion of its costs of operation, namely, the risk of injury to any animal that might fall into it. This is the meaning of economic "externalities": those who cannot benefit from an economic decision are forced to pay for part of the costs of operation.

Biblical civil law settles the question of property rights and the responsibilities of ownership. Because the Bible affirms the rights of private ownership—meaning *legal immunities* from interference by either

the state or other agencies in the use of one's property—it therefore imposes *responsibilities* on owners. The law regulating uncovered pits is not an infringement on private property rights. On the contrary, it is an *affirmation* of such rights. By linking personal economic responsibility to personal, private ownership, biblical civil law identifies the legal owner of the pit, namely, the person who is required to pay damages should another person's animal be killed by a fall into the unsafe pit. He receives some sort of advantage from the pit, and therefore he must bear the expense of making it safe for other people's animals.

A. "Pit" in Rabbinical Literature

"Pit" is a classification used for centuries by the rabbis to assess responsibility and damages. The Mishnah specified that any pit ten handbreadths deep qualifies as deep enough to cause death, and therefore is actionable in cases of death. If less than this depth, the pit is actionable in case of injury to a beast, but not if the beast died.[1] Wrote Jewish legal scholar Shalom Albeck:

> This is the name given to another leading category of tort and covers cases where an obstacle is created by a person's negligence and left as a hazard by means of which another is injured. The prime example is that of a person who digs a pit, leaves it uncovered, and another person or an animal falls into it. Other major examples would be leaving stones or water unfenced and thus potentially hazardous. The common factor is the commission or omission of something which brings about a dangerous situation and the foreseeability of damage resulting. A person who fails to take adequate precautions to render harmless a hazard under his control is considered negligent, because he is presumed able to foresee that damage may result, and he is therefore liable for any such subsequent damage.[2]

Samson Raphael Hirsch, the brilliant mid-nineteenth-century Jewish Torah commentator, analyzed the economics of negligence under the general heading of property, and property under the more general classification of guardianship. "Man, in taking possession of the unreasoning world, becomes guardian of unreasoning property and is responsible for the forces inherent in it, just as he is responsible for the forces of his own body; for property is nothing but the artificially

1. *Baba Kamma* 5:5, *The Mishnah*, ed. Herbert Danby (New York: Oxford University Press, [1933] 1987), p. 338.

2. "Avot Nezikin: (2) Pit," *The Principles of Jewish Law*, edited by Menachem Elon (Jerusalem: Keter, 1975?), col. 326. This compilation of articles taken from the *Encyclopedia Judaica* was published as Publication No. 6 of the Institute for Research in Jewish Law of the Hebrew University of Jerusalem.

extended body, and body and property together are the realm and sphere of action of the soul—*i.e.*, of the human personality, which rules them and becomes effective through them and in them. Thus is the person responsible for all the material things under his dominion and in his use; and even without the verdict of a court of law, even if no claim is put forward by another person, he must pay compensation for any harm done to another's property or body for which he is responsible."[3] The guardian is always responsible before God for the administration of everything under his legal authority.

Hirsch went so far as to say that our willingness to indemnify a victim is not enough, morally speaking; we must take care not to allow damage in the first place. "Once you have done harm the only thing you are able to do is to pay compensation; you can never undo the harm and wipe out all its consequences."[4] A righteous person should become a blessing for those around him. "You, with all your belongings, should become a blessing; be on your guard that you and your belongings do not become a curse! Watch over all your belongings so that they do no harm to your neighbour!" And also what you throw away or pour away—see to it that it do no harm; you ought to bring good, so do not bring evil!"[5] Thus, our economic responsibility is an *active* responsibility. We must actively seek to avoid harming others. It is within this moral framework that the Bible discusses the uncovered pit.

B. Animals and Children

This case law deals specifically with animals. It does not mention people. Why not? Because the pit is almost certainly located on the land of the person who digs it. An animal that wanders onto the man's property has no understanding of private property rights. Presumably, no fence has restrained it from coming onto the property. If a fence is present, then the animal would have to knock it down to get onto the property. The damage to the fencing would then be the responsibility of the owner of the animal. He should have restrained his animal. *The fence in such an instance serves as the legal equivalent of a cover*. But unrestrained access to the area of the uncovered pit places the responsibility on the land-owner. An animal is not expected to honor the law against trespassing.

3. Samson Raphael Hirsch, *Horeb: A Philosophy of Jewish Laws and Observances*, trans. I. Grunfeld (New York: Soncino, [1837] 1962), pp. 243–44, paragraph 360.

4. *Ibid*., p. 247, paragraph 367.

5. *Ibid*., p. 248, paragraph 367.

What holds true for an animal is also true for a young child. If the child is not restrained by a fence or a cover over the pit, then the owner is liable. Like an ox with a reputation for violence, so is the uncovered pit. The owner is responsible. The parents of a child who is killed by a fall into an uncovered pit are entitled to the same restitution as the heirs of a victim of an ox that was known to be dangerous.

A responsible adult who comes onto another person's property and falls into a pit has to have a legitimate reason for being there. If the uncovered pit is located on a path over which a visitor might normally pass, and the pit is not easily visible, then the owner becomes legally responsible. The visitor, in this instance, is like a dumb animal: he is not aware of special prohibitions against walking in the vicinity of the uncovered pit. But if the visitor has climbed over a fence and is wandering over the property in the dead of night, where he has no reason to be, then the owner is innocent. If the intruder ignores "No Trespassing" signs, he is also unprotected by the "covered pit" law. He is not to be treated in a literate culture as if he were a dumb animal. Albeck commented: "If the *bor* [pit] (i.e., the hazard) is adequately guarded or left in a place where persons or animals do not normally pass, such as one's private property, no negligence or presumed foreseeability can be ascribed and no liability would arise."[6]

The pit-digger is required to reimburse the owner of the dead beast. The latter can then buy a replacement for the dead animal. The pit-digger becomes the owner of the dead animal. In Israel, he could have sold it or eaten it, because it died of a known cause; it did not die "of itself," which would have made it forbidden meat for Israelites (Deut. 14:21). The pit-digger does not suffer a total loss.

In modern times, people build swimming pools on their property. These are certainly uncovered most of the swimming season. They are holes in the ground. Are these the modern equivalent of a pit? No. A pit is a hole in the ground that is not expected. It is not readily visible. A swimming pool has a cement deck around it. It may have a diving board. It is plainly visible in the back yard. It is anything but inconspicuous. Besides, if an animal falls into it, it will swim out. If a small child falls into it, liability could be imposed on the owner only under the "railed roof" statute (Deut. 22:8),[7] not under the "uncovered pit" statute. The pool is a place of entertainment and recreation, just as

6. Albeck, "Pit," *Principles of Jewish Law*, col. 326.

7. Gary North, *Inheritance and Dominion: An Economic Commentary on Deuteronomy*, 2nd ed. (Dallas, Georgia: Point Five Press, [1999] 2012), ch. 54.

flat-roof housetops were in the ancient world. It is not a pit which men stumble into unexpectedly. The so-called "attractive nuisance" problem—a dangerous object to which small children are attracted—falls under the railing statute.

C. Public "Pits"

There are areas of life that are almost always the responsibility of the civil government. Highways are one example. If people are to use the highways, they need protection, both as drivers and pedestrians. The civil government erects stop signs and stop lights; it places other road signs along the highways, so that drivers can drive more safely and make better high-speed decisions. Similarly, residential areas and school zones are restricted to slower traffic. This protects pedestrians and home owners who would otherwise face the continual threat of high-speed vehicles that are difficult to control in tight quarters.

1. Speed Laws

The posting of a speed limit is essentially the same as a private citizen who posts a "no trespassing" sign, or a "beware of dog" sign on his property. The sign serves as a substitute for the "cover for the pit"; the sign, like the cover, is a device for *protecting the innocent*. Where children in cities are forced to cross busy streets, local governments hire crossing guards to control traffic and help younger children across the street. Sometimes, older students in a grammar school serve as unpaid crossing guards in a safety patrol. In some communities, fenced, overhead ramps are built across busy highways. The fence serves as a means of protection for (1) pedestrians who might fall off the overpass and (2) motorists who face risks from vandals who would drop heavy rocks onto the passing cars beneath. But fences are expensive, and they cannot be built in every residential area. Thus, the civil government establishes speed limits, and it posts signs that warn drivers of these limits.

A philosophy of nearly risk-free existence would impose speed limits of no more than a few miles per hour on all drivers, except perhaps on specially designed highways. But voters, who are both pedestrians and drivers, would not long tolerate such utopian restrictions. In most places in the United States, voters drive far more hours during the day than they walk. So, they will not allow defenders of the rhetoric of risk-free living to have their way. They make judgments as individuals that legislators must respect in the aggregate: *speed limits that*

meet the needs of voters, both as drivers and pedestrians, or the parents of pedestrians. Once the speed limit is posted, people make personal adjustments, both as drivers (by slowing down to approach the legal limit, but letting pedestrians look out more for themselves) and as pedestrians (by reducing their watchfulness about cars, so long as cars are moving at or near the posted limit). Voters compromise: slower speeds close to schools, but faster speeds on highways.

Drivers who violate these limits are increasing the statistical risks of walking in a neighborhood. Residents believe that they have been granted a degree of safety by the authorities—not perfect safety, because automobiles are still permitted in the area, but *calculable safety*. They use the streets and sidewalks in terms of this greater degree of safety. But pedestrians and other (slower) drivers are threatened by those who refuse to honor the posted speed limit. They have made decisions in terms of a given environment ("25 m.p.h."), and a lawbreaker unilaterally alters this environment. He has, in effect, torn down the protective fencing. He has "uncovered the pit."

2. Fines and Restitution

What is the proper remedy? Most communities impose fines for excessive speeding, with the fines proportional to the violations: a higher fine for a higher speed. Can a fine be justified biblically? Yes. *The fine is imposed because a specific victim cannot be identified*. No one was injured by the speeding vehicle. Therefore, the civil government collects a *restitution payment* in the name of all the victims who had their lives and property *threatened* by the speeder's act.

A statistically measurable risk of injury was transferred by the speeder to those in the area of his speeding vehicle. This is another case of "externalities": people are being forced by the speeder to bear risks involuntarily. The fines should be used to establish *a trust fund for future victims of "hit and run" auto accidents*, where the guilty party cannot be located and/or convicted. The perpetrator of this "victimless crime" becomes a source of restitution payments for the subsequent victims of this same criminal act by an unconvicted agent. *Fines are therefore an acknowledgement by the authorities of the limits placed on their knowledge*. If law enforcement authorities were omniscient, all restitution payments in a biblical society would go from the known criminal to the known victim.

Fines should be imposed by local authorities for a specific purpose: to make restitution payments to victims who reside in the same

general neighborhood. The civil government acts as a *trustee* for future victims in cases where the authorities cannot locate or convict the violator. *Fines are not to be regarded as a normal source of revenue for the civil government*. The civil government must enforce biblical law without prejudice. The bureaucrats' fond hope of collecting municipal operating revenues from fines creates prejudice. In a biblical commonwealth, taxes are supposed to finance civil government—*predictable* taxes that are collected from every responsible adult in a community. Citizens must know what law enforcement is really costing them. Setting up "speed traps" along the highway so that non-residents can be forced to finance the local government is a gross perversion of the function of the fine. This subsidizes local bureaucrats rather than assisting future victims.

3. Drunk Drivers

An individual who deliberately distorts his own perceptions is implicitly attacking God and his God-created environment.[8] He is saying by his actions that God has not been fair to him in placing him in such an environment. He then makes decisions under the influence of alcohol or drugs. These decisions can physically damage others because of his self-induced distorted perceptions. Drunk drivers are therefore to be prosecuted as criminally negligent, should their acts cause damage. They have "torn off the pit cover" with impunity. Their injury-inflicting acts are not to be considered as accidents, meaning low-probability events that cannot reasonably be predicted in advance in the life of any specific individual. Their injury-inflicting actions are rather the product of an act of moral rebellion: the implicit denial of their own personal responsibility for their actions.

Drunk drivers impose increased statistical risks on their potential victims. The victim or the heirs must be given the legal option of imposing a heavy restitution payment, under the guidance of the judges. Where there is no victim, the drunk driver must pay the fine.

Repeated convictions for drunk driving indicate moral rebellion. Here is a person who has the equivalent of a notorious ox: the lawless "beast" is inside him. Worse: he is responsible in a way that a beast is not. He has moral insights concerning the consequences of

8. Obviously an exception is the person who has accepted an anesthetic in order to reduce his pain. Thrashing around in agony during a medical operation clearly reduces the likelihood of a successful operation. But such people are always placed under medical observation and supervision. They are not legally responsible agents during their period of distorted perceptions.

his acts that a beast does not possess. The authorities can legitimately "tie him up" by revoking his right to operate a vehicle until he has demonstrated his continued sobriety for a fixed period of time. Like a notorious ox that must be fenced until it becomes self-disciplined, so is the drunk driver, or the repeat speeder, or the driver who drives under the influence of drugs. There may not be identifiable victims, but there are certainly *statistical victims* whose interests need protection.

The same principles of economic analysis that apply to speeding and drunk driving can be applied to other areas of life in which the state is the primary protector of life and limb. Fines to the civil government should be imposed on convicted violators only in cases where the civil government is acting as a trustee for future unknown victims.

D. Political Hypocrisy

The problem today is that society refuses to accept the morally and legally binding nature of Old Testament legal principles of criminal negligence. First, legislators do not consistently make "pit owners" legally liable for damages, as the Bible requires. The most flagrant example is the failure of state and local governments to impose stiff fines on all drunk drivers, and capital punishment on drunk drivers whose unsafe driving leads to someone else's death. Furthermore, politicians do not impose fines on themselves or city employees for failing to repair public streets with potholes which cause damages to people's cars or which cause accidents.

Second, politicians pass safety laws (or allow the bureaucracy to define and then enforce earlier laws) whose costs to the general public are not immediately perceptible. Politicians may require automobile companies to install seat belts that buyers do not want to pay for, and which occupants subsequently refuse to use, but politicians are not about to pass a law that would impose fines on families for refusing to install smoke detectors in their own homes. The first piece of legislation would not gain the reprisal of voters; the second probably would. In short, they pass pieces of legislation with minimal political and statistical impact (for good or evil) in terms of the utopian principle of "better to spend millions of dollars than to suffer one dead victim," but fail to honor it in statistically relevant cases because of the equally relevant (to them) political backlash they would receive from voters. The proclamation of the "better millions of dollars than. . . ." principle has been, is, and will continue to be the product of economic ignorance and political hypocrisy.

This is not to say that it is always wrong to require owners to pay more in order to save lives, but the Bible provides us with the proper guidelines, not some hypothetically universal utopian principle that would necessitate the creation of a messianic state. The general principle is simple: *those who own a known dangerous object are legally responsible for making it safer for those who are either immature or otherwise unwarned about the very real danger*.

Conclusion

Ownership is a social function.[9] There is a link between the costs and benefits of lawful ownership. He who *benefits* from the use of private property must also bear the *costs* of ownership. He cannot legitimately pass on the costs to other people who have not voluntarily agreed to accept these costs. He is also responsible for the risks of physical damage that he imposes on them without their prior knowledge and consent.

The pit-digger must cover the pit or be responsible for the consequences. The owner of an unpenned notorious ox is equally responsible. Beasts are not expected to understand property rights; the owner must fence his property, or cover his pit, or pay restitution to the dead beast's owner. He cannot legitimately pass on the risks associated with uncovered pits to his neighbors.

The civil government has an analogous responsibility to protect those who use the property which belongs to, or is administered by, the state. Thus, speed limits, crossing guards, and school safety patrols are created. Patrol cars monitor traffic in neighborhoods. Fines are collected from speeders and other traffic violators. Why fines? Because there are limits on the knowledge of law enforcement authorities; thus, fines are used as a way to collect restitution payments from known violators, and to make payments to victims of unknown violators.

Responsibility is personal, and it involves every area of authority exercised by any individual. The civil government has the obligation of setting forth principles of judicial interpretation that will prevail in any civil court. The court will look at the circumstances surrounding the injured party, and determine who was responsible. If the owner was attempting to pass on involuntarily to innocent third parties the

9. Gary North, "Ownership: Free but Not Cheap," *The Freeman* (July 1972). Reprinted in Gary North, *Introduction to Christian Economics* (Nutley, New Jersey: Craig Press, 1973), ch. 28.

risks of ownership, the court will find the owner guilty. All property owners know this in advance, and they can take steps to reduce their legal risks by reducing involuntary risks borne by innocent third parties.

The Bible does not warrant the establishment of a huge bureaucracy to define every area of possible risk, promulgate minute definitions of what constitutes unlawful uses of property, and describe in detail every penalty associated with a violation. The Bible certainly does not indicate that the civil government is warranted to step in and proclaim a potentially injurious action illegal, except in cases where the violator could not conceivably make restitution to all the potential victims (e.g., fire codes) or in cases of repeated violations (the "notorious ox" principle). The Bible simply reminds property owners of the consequences of creating hazards to life and limb for third parties who are not consulted in advance concerning their willingness to bear the risks. The property owner is assumed to be competent to make judgments for himself concerning the consequences of his actions, and then take the steps necessary to reduce these risks.

42

KNOWLEDGE, RESPONSIBILITY, AND THE PRESUMPTION OF GUILT

And if one man's ox hurt another's, that he die; then they shall sell the live ox, and divide the money of it; and the dead ox also they shall divide. Or if it be known that the ox hath used to push [gore] in time past, and his owner hath not kept him in; he shall surely pay ox for ox; and the dead shall be his own.

EXODUS 21:35–36

The theocentric focus of this law is God's omniscience. Man does not possess this attribute. Omniscience is a noncommunicable attribute of God. Delegated ownership imposes responsibility in terms of knowledge. The greater is a person's knowledge, the greater is his responsibility (Luke 12:47–48).[1]

The crucial fact in these verses is that two different sorts of offending oxen are dealt with: a previously peaceful ox and a notorious ox. Because of these differences, the penalties differ. The question is: Why?

A. A Domesticated Beast

An ox is a domesticated work animal. It is under the dominion of its owner. The owner therefore incurs certain responsibilities for the behavior of his animal. The animal is to refrain from attacking man or other animals of its own species. The owner must take steps to train the animal to respect the life and limbs of others, or else he is to restrain its ability to inflict such injuries.

The concept of a domesticated animal points to the ability of men

1. Gary North, *Treasure and Dominion: An Economic Commentary on Luke*, 2nd ed. (Dallas, Georgia: Point Five Press, [2000] 2012), ch. 28.

to train and discipline lower species. Animals are responsible to man, and by implication, to God. The owner of a dangerous beast must see to it that others in the vicinity do not become involuntary risk-bearers as a result of the animal's lack of self-discipline. To create judicial incentives for owners of oxen to train or restrain their beasts, the Bible sets forth principles of economic responsibility.

Say that a man's previously passive ox gores another ox to death. Because the ox has gored another animal, but not a human, it is not to be killed by the original owner. It is to be sold to a third party. The third party who subsequently buys it may kill it if he wishes; if he does, he reduces his risks of ownership. The ox has become a notorious ox. There are risks associated with the ownership of such a beast. There are costs of fencing it or restraining it in some fashion. The new owner may decide not to keep it alive.

There is also no biblical law that restricts the original owner from making an offer to buy back (redeem) the ox from the third party, but the law requires that the beast be sold initially.

The case of the notorious ox is different. The owner is fully responsible, exactly as the owner of the uncovered pit is responsible. This case law presumes that for the owner to be liable, the notorious beast not be penned in or otherwise restrained, just as in the case of the notorious ox that gores a human (Ex. 21:29). The owner has to pay the full value of the dead beast to the beast's owner. Again, he is allowed to keep the dead animal. He is also allowed to keep the offending animal.

Why isn't the offending animal stoned to death for killing another beast, as would be required in the case of an unpenned notorious ox that gores a man or woman to death? The reason should be clear to anyone who understands the implications of the dominion covenant. An ox is *responsible upward*, toward man. It suffers the death penalty for killing a man. The *innate fear of man*, which is in all animals (Gen. 9:2), serves as a *restraining factor*, a kind of "fence" that the animal knows it must not break through. By killing a man, the ox has demonstrated that it actively transgressed this God-imposed restraint. It is therefore rebellious and deserving of death. It is acting like the serpent of Genesis 3, and therefore it suffers a judicial penalty. But it is not held responsible "to the death" for killing another animal. It is not "responsible outward," toward other beasts. Its owner is responsible for its behavior "outward," not the ox.

B. Who Pays?

Who pays for damages? The owner of the surviving ox pays. Under normal circumstances, the individual who is legally and financially responsible is the owner of the offending ox that initiated the attack. But there is a problem here. Whose beast took the initiative? Can this be determined in a court of law? Were there witnesses? Can we understand the motivation of oxen? These questions are almost self-explanatory. The assessment of which animal "started it" is most problematical. The ox cannot be placed under oath and cross-examined.

The Bible's solution is to divide the proceeds from the sale of the surviving animal, and to divide the carcass of the dead one. Each owner has an incentive to maximize the proceeds from the sale of the survivor, because both of them gain an equal share of the sale price. The owner of the dead beast cannot come before the judges and claim that his beast was worth 10 times as much as it really was worth. The judges do not have to call in specialists in assessing retroactively the value of dead cattle. They can leave it to both owners to settle their differences. Each man has an incentive to get the transaction over with. Neither can trick the other (or the judges) as to the former value of the dead beast. The market then reveals the live beast's value.

The dead beast is also worth something. The Old Testament rules prohibiting the sale of unclean dead beasts (Deut. 14:21; Lev. 17:15) do not apply in the New Covenant era. Even under the Old Covenant, the beast could be sold to a resident alien gentile (Deut. 14:21b). Today, the beast can lawfully be sold to Jew or gentile if the carcass meets public health standards. Each owner receives an equal share of the returns.

What if a run-of-the-mill bull kills a champion? The owner of the champion suffers the greater loss. But because it cannot easily be determined which bull initiated the violence, the court is not required by God to examine the detailed question of what is owed to the owner of the dead beast. This law implicitly recognizes the limitations on courts in assessing responsibility in the case of the behavior of animals. Owners of prize animals are forewarned to take care of their property.

C. Jewish Law: Whose Ox Is Gored?

The Mishnah makes some exemptions to this law. "If an ox of an Israelite gored an ox that belonged to the Temple, or an ox that belonged to the Temple gored the ox of an Israelite, the owner is not culpable,

for it is written, *The ox of his neighbour* [Ex. 21:35]—not an ox that belongs to the Temple."[2] This is most peculiar. One would think that if any ox was to be protected by the threat of damages imposed on the owner of the killer ox, it would be an ox belonging to the temple Why the word "neighbor" excluded the temple is not explained.

The Mishnah continued: "If an ox of an Israelite gored the ox of a gentile, the owner is not culpable. But if the ox of a gentile gored the ox of an Israelite, whether it was accounted harmless or an attested danger, the owner must pay full damages."[3] Almost a millennium later, Maimonides agreed. He exempted the Israelite owner from being required to pay damages, whether or not he was forewarned about his beast, if his ox gores an ox belonging to a heathen. He added reasons for the Mishnah's discriminatory law. The "heathen do not hold one responsible for damage caused by one's animals, and their own law is applied to them." (This is truly preposterous, and he offers no evidence.) On the other hand, the heathen is fully liable, whether or not he was forewarned, if his ox gores the ox of an Israelite. Why? Because "should they not be held liable for damage caused by their animals, they would not take care of them and thus would inflict loss on other people's property."[4] This is a classic example of different laws for different residents, in open violation of Exodus 12:49.[5]

Maimonides argued that if the ox was unowned at the time of the goring, and is subsequently appropriated by someone else, before the plaintiff can seize it, the new owner is not liable for previous damages.[6] This would leave the victim without recourse, and it would also leave the animal immune from judgment, for it would not serve as payment—ox for ox—for the damages it caused. (Rabbi Judah had early argued that "A wild ox, or an ox belonging to the temple, or an ox belonging to a proselyte who died are exempt from death, since they have no owner.")[7]

2. *Baba Kamma* 4:3, *The Mishnah*, ed. Herbert Danby (New York: Oxford University Press, [1933] 1987), p. 337.

3. *Idem*.

4. Moses Maimonides, *The Book of Torts*, vol. 11 of *The Code of Maimonides*, 14 vols. (New Haven, Connecticut: Yale University Press, [1180] 1954), "Laws Concerning Damage by Chattels," I:VIII:5, p. 29.

5. Chapter 14.

6. Maimonides, *Torts*, I:VIII:4, p. 29.

7. *Baba Kamma* 4:7, *Mishnah*, p. 337. The Talmud also specifies that the ox had to have gored on three previous occasions for the owner to become personally liable: Shalom Albeck, "TORTS. The Principal Categories of Torts," in *The Principles of Jewish Law*, edited by Menachem Elon (Jerusalem: Keter, 1975?), col. 322.

Even more incredibly, Maimonides argued that if the existing owner renounces ownership after the goring takes place, but before the trial, "he is exempt, for there is no liability unless the ox has an owner both at the time it causes the damage and at the time the case is tried in court."[8] This would destroy personal legal liability in the most serious cases. The owner would be allowed to separate himself retroactively from the social responsibilities of ownership, as if ownership of a physical object were all that is involved in ownership, and not also the legal immunities and legal responsibilities that are inescapably bound up with possession of the object. Maimonides did not say that the victim may not demand that the beast be destroyed or sold in order to compensate him. He did say that if the owner sells the animal, the victim can collect compensation from the animal, and the buyer must reclaim damages from the defendant.[9]

Maimonides also added that the testimony of certain witnesses is invalid: slaves, shepherds, children, and women. "One must not think that because only slaves, shepherds, or similar persons are generally found in horse stables, cattle stalls, or sheep pens, these should be heard if they testify that one animal has caused damage to another, or that children or women should be relied on if they testify that one person has wounded another or if they testify about other types of damage."[10]

The Christian commentator finds little that he can appeal to in confidence in Jewish laws regarding the goring ox. It is no better in the case of the notorious ox. How many occurrences establish a pattern of habitual action? How many gorings need to take place before the beast is identified as a notorious beast? It was the opinion of Rabbi Meir that the court should identify as an "attested danger" any ox against which three separate proven accusations of damage have been brought in the past.[11] Maimonides did not indicate how many accusations were required, unlike the Mishnah and Talmud, but he indicated that it must be more than one. "An animal is called *mu`ad*, 'forewarned,' with respect to actions which it does normally and habitually, and *tam*, 'innocuous,' with respect to actions which it does only exceptionally and which are not normally done by members of its species—as, for example, if an ox gores or bites. If an animal, having acted abnormally once, makes it a habit to repeat the abnormal

8. Maimonides, *Torts*, I:VIII:4, p. 29.
9. *Ibid*., I:VIII:6, p. 29.
10. *Ibid*., I:VIII:13, p. 31.
11. *Baba Kamma* 1:4, *Mishnah*, p. 333.

action on numerous occasions, it becomes 'forewarned' with respect to the particular action which it has made a habit. For Scripture says, *Or if it be known that the ox was wont to gore* (Exod. 21:36)."[12]

We need better guidelines than this.

D. The Notorious Ox

Responsibility is more easily assessed by a court in the case of an ox that was known in the past to be a violent animal. The owner had been given a previous warning concerning the behavior of the beast under his jurisdiction. Perhaps the court had convicted this beast of a prior violation; perhaps witnesses had independently complained to the civil authorities, who then had issued the owner a formal warning. There is no indication in the text that three warnings are required; one warning should be sufficient to persuade the owner to take additional steps to restrain his beast. From the time of the warning, it becomes the owner's responsibility to keep the beast penned in or in some way restrained from inflicting damage on others.

This case law applied to an owner who chose to keep possession of the beast. Thus, he simultaneously chose to bear the additional risks associated with the behavior of that particular beast. The owner also chose not to take the time and trouble necessary to restrain the beast. This is his lawful decision. No one is sent by the civil government to inspect the quality of the fence or the strength of the rope around its neck. But its owner is prohibited by biblical law from passing on these now-known risks of ownership to innocent third parties. *Self-government under law*—written laws with specified, predictable sanctions—is the biblical standard, not a legal order based on a top-down bureaucratic enforcement system.

The judicial problem with this rule regarding the notorious ox is its vagueness: How much information is enough? The Bible says that if the ox was known to gore in the past, it becomes for legal purposes a notorious beast. Known by whom? By the owner, certainly. But how can this knowledge be proven in court to have been in the possession of the owner? Only through previous publicly provable complaints registered by neighbors, either to the owner or the public authorities, or by a single prior conviction of the beast. If the owner has publicly provable evidence that the ox gored someone in the past, he becomes legally liable.

12. Maimonides, *Torts*, I:I:4, pp. 4–5.

Obviously, if the beast has gored on several occasions, it is a known offender. But society needs to defend the property of victims of the beast in the meantime. This passage of Scripture establishes that the issue of legal liability in the case of the damage-producing actions of a dangerous domestic animal is to be established in terms of *the judges' ability to assess comparative knowledge between the plaintiff and the defendant*. The owner is presumed to have better information concerning his beast's behavior than an outsider possesses. Thus, a single proven case of previous bad behavior on the part of an ox places its owner at risk judicially.

"Or if it be known that the ox hath used to push [gore] in time past, and his owner hath not kept him in; he shall surely pay ox for ox" (Ex. 21:36). What is the meaning of "ox for ox"? In the previous case of a beast whose dangerous behavior had not been a matter of public knowledge, the owner of the dead beast does not receive a replacement ox. He only receives half of the proceeds of the sale of the live ox and the dead ox's carcass. But this case is different. The goring beast is known to have gored in the past. The owner of the dead ox is to be fully reimbursed, "ox for ox."

Does this mean that the owner of the dead beast is simply to be given the surviving ox? This would be a very unlikely interpretation. First, the surviving ox is now a known renegade. It is a menace, as the owner of the dead ox knows only too well. The owner of the survivor therefore would be transferring ownership of a high-risk beast to the owner of the victim. But a high-risk property always commands a lower sale price than a low-risk property, for obvious reasons. The buyer has to be compensated for the added liability he is accepting by purchasing the high-risk property.

Second, the market value of the dead beast may be far higher than the transgressing survivor, irrespective of the risk factor. Perhaps the dead beast was a prize-winning beast. The victim now can sue for damages. He is to be reimbursed, "ox for ox." In other words, he is to be reimbursed like for like, value for value. On the one hand, as the owner of a champion bull, he has a financial incentive to keep his high-value beast away from any potentially dangerous beast that has not been identified as dangerous. On the other hand, it is the responsibility of the owner of a known renegade beast to keep it away from other bulls, especially champion bulls. The economic burden now shifts to the owner of the killer beast.

What is the difference between the two cases? In both cases, one

man loses his beast, and another man's beast survives. The difference has to do with differences in *knowledge*; by the court, by the dead beast's owner, and by the surviving beast's owner. Greater knowledge establishes greater responsibility (Luke 12:47–48).

This principle of comparative knowledge leads to the conclusion that specific animals are by nature dangerous, and only marginally and sporadically responsive to human training, are automatically considered notorious. Maimonides defined such animals as those that kill by goring, biting, clawing, or similar action. Following the Mishnah,[13] he listed the wolf, lion, bear, panther, and leopard. He also added snakes, but strangely enough, only those that have bitten in the past.[14] These species would today be classified as "exotic animals." Most communities in the United States place legal restrictions on the private, non-institutional ownership of such animals, and in many cases such ownership is banned by law. To these species should probably be added species of dogs that have been bred to be fighters. The very possession of such breeds places the owners at risk. The individual animal may not be known to be dangerous, but it can be presumed in advance by the owner to be dangerous, and therefore also by the court retroactively.

E. Limited Knowledge

The court's knowledge is limited, yet it has to have evidence to make a judgment. The only evidence sufficiently reliable to allow the court to presume guilt on the part of a beast is the beast's previous public record. Why must the court presume guilt? Because there is no way for the court to determine guilt with the same degree of accuracy that must prevail in deciding human transgressions of the law, where the innocence of the accused is presumed.[15]

1. Establishing Value

First, let us consider the case of the goring of a prize-winning beast by a previously peaceful ox. The prize-winning beast's owner has to bear the increased risks associated with ownership of a champion beast. He has to assess the risks of putting it in close contact with other beasts. Neither he nor the owner of the previously tame

13. *Baba Kamma* 1:4, *Mishnah*, p. 332.

14. *Torts*, I:I:6, p. 5.

15. I am speaking here of common law societies. Napoleonic Code societies do presume that the accused is guilty unless proven innocent.

beast had special knowledge of the future behavior of either beast. Neither owner possessed a uniquely inexpensive way to gain such knowledge. Therefore, neither owner is to be assessed by the court with special burdens of responsibility, because the knowledge of each is presumed to be the same. It might have been the champion beast that was the potential killer.

Second, in the case of the owner of a known renegade beast, the court can presume that he had access to better knowledge concerning the behavior of his beast than the dead beast's owner had with respect to either beast. Because the owner of the renegade had greater knowledge concerning his beast's behavior—knowledge that was *less expensive* for him to obtain than for the owner of the dead beast to have obtained—the law finds him guilty of negligence. He had the responsibility to keep his beast away from other beasts, especially championship beasts. The *burden of economic responsibility* is different because the *costs of obtaining better knowledge* are different.

This is why "ox for ox" refers to a *replacement of equal value*. The owner of the dead beast is entitled to full-value compensation. Nevertheless, championship beasts can become renegades, too. It would not be fair for the owner of a newly vicious beast that is worth, say, 100 ounces of gold, to be forced to sell his beast and split the proceeds with the victim's owner, just because his beast killed a beast worth, say, one ounce of gold. He is required to pay the owner what it will cost him to buy a replacement beast, but no more. Were it otherwise, it would pay owners of average beasts to place their beasts in close proximity to the champion but possibly violent beast, in the hope that a fight would take place in which the less valuable beast is killed. The Bible does not recommend laws that promote profit-seeking violence.

The owner of the survivor gets to keep the carcass of the dead beast. "If the ox hath used to push [gore] in time past, and his owner hath not kept him in; he shall surely pay ox for ox; and the dead shall be his own." He has paid the owner of the dead beast, ox for ox. But the owner of the dead beast is not entitled to everything. The man who is required to pay at least gets something.

2. Guilt Is Presumed

Again, this recognizes the limitations of judges to make perfect assessments concerning which beast was responsible. The victim does not lose anything, economically speaking, but he is not given a bonus

payment, either. Why doesn't the owner of the survivor owe a penalty payment to the victim? Because the courts cannot ascertain that the renegade was completely responsible. Guilt is *presumed* by the court; it need not be established beyond reasonable doubt, unlike a case involving human behavior. In a legal dispute involving human beings, the present guilt of a previously convicted criminal is not to be presumed by the court; it must be proven. But a decision must be rendered by the court in order to honor God's law and to preserve the juridical foundation of social peace. So the court is required to presume one beast's guilt, and therefore its owner's responsibility.

The Bible is silent with respect to fights between two known renegade beasts, but by an extension of this argument, it can safely be concluded that the first example becomes the standard. The surviving beast is sold and the proceeds are divided. The court cannot presume to know which beast started the fight.

Conclusion

Biblical law favors neither the rich nor the poor. It places a greater burden of responsibility on the owner who has access to better or cheaper information concerning the probable behavior of a domesticated beast under his command. Biblical law implicitly recognizes that *knowledge is not a zero-cost resource*, and therefore neither courts nor owners should be treated as if they were omniscient.

Where two beasts with clean records fight, and one is killed, the owners split the proceeds. Where the surviving beast was known to be a greater risk, its owner must fully compensate the victim for his economic loss, on the basis of equal value restored. The court is not required to presume which beast was responsible in the first example, but it is required by God's law to make this presumption automatically in cases involving a known renegade. The important thing, however, is that judgment be rendered by the court. Without judgment, social peace cannot long be maintained.

43

PROPORTIONAL RESTITUTION

> *If a man shall steal an ox, or a sheep, and kill it, or sell it; he shall restore five oxen for an ox, and four sheep for a sheep. . . . If the theft be certainly found in his hand alive, whether it be ox, or ass, or sheep; he shall restore double.*
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> EXODUS 22:1, 4

In any attempted explanation of a Bible passage, we must have as our principle of interpretation the Bible's revelation of the theocentric nature of all existence. God created and now sustains all life. Thus, a sin against a person is first and foremost a sin against God. Restitution must always be made to God. God demands the death of the sinner as the only sufficient lawful restitution payment. But God allows a substitute payment, symbolized in the Old Testament economy by the sacrifice of animals. These symbols pointed forward in time to the death of Jesus Christ, which alone serves as the foundation of all of life (Heb. 8). Jesus Christ made a temporary restitution payment to God in the name of mankind in general (temporal life goes on) and a permanent one for His people (eternal life will come).[1] Adam deserved death on the day he rebelled; God gave him extended life on earth because of the atonement of Christ. The same is true for Adam's biological heirs. We live because of Christ's atonement, and only because of it.

Crimes can also be against men. This means that restitution must be made to the victim, not just to God. There is no forgiveness apart

1. Gary North, *Dominion and Common Grace: The Biblical Basis of Progress* (Tyler, Texas: Institute for Christian Economics, 1987), chaps. 3, 6. The Bible passage that indicates these two aspects of salvation is I Timothy 4:10: "For therefore we both labour and suffer reproach, because we trust in the living God, who is the Saviour of all men, specially of those that believe." Gary North, *Hierarchy and Dominion: An Economic Commentary on First Timothy*, 2nd ed. (Dallas, Georgia: Point Five Press, [2001] 2012), ch. 6.

from restitution: Christ's primarily, and the criminal's secondarily. As images of God, victims are entitled to restitution payments from criminals. Because crimes differ in terms of their impact on victims, penalties also vary. The biblical principle is a familiar one in Western jurisprudence: *the punishment must fit the crime*. Because economic restitution is the form that punishment must take in the case of theft, *economic restitution must therefore "fit the crime."* It must fit the crime in at least three ways: first, by restoring to the victim as closely as possible the value of what had been stolen; second, by compensating the victim for his suffering in losing the item or items; third, by compensating the victim for the costs of detecting the thief.

A. Costs of Retraining: The Traditional Explanation

R. J. Rushdoony's discussion of multiple penalties, which he called multiple restitution, is important for the light it sheds on the first aspect of restitution, the payment necessary to compensate the victim for the loss he suffered as a result of the theft. Unfortunately, Rushdoony followed rabbinical tradition and introduced an extraneous issue which confuses the discussion, namely, the *use-value of the animals*. He wrote:

> Multiple restitution rests on the principle of justice. Sheep are capable of a high rate of reproduction and have use, not only as meat, but also by means of their wool, for clothing, as well as other uses. To steal a sheep is to steal the present and future value of a man's property. The ox requires a higher rate of restitution, five-fold, because the ox was trained to pull carts, and to plow, and was used for a variety of farm tasks. The ox therefore had not only the value of its meat and its usefulness, but also the value of its training, in that training an ox for work was a task requiring time and skill. It thus commanded a higher rate of restitution. Clearly, a principle of restitution is in evidence here. Restitution must calculate not only the present and future value of a thing stolen, but also the specialized skills involved in its replacement.[2]

Walter Kaiser agreed.[3] The Jewish scholar, Cassuto, argued along similar lines: "*He shall pay five oxen for an ox, and four sheep for a sheep*—less for a sheep than for an ox, possibly because the rearing of a sheep does not require so much, or so prolonged, effort as the rear-

2. R. J. Rushdoony, *The Institutes of Biblical Law* (Nutley, New Jersey: Craig Press, 1973), pp. 459–60.

3. Walter C. Kaiser, Jr., *Toward Old Testament Ethics* (Grand Rapids, Michigan: Zondervan Academie, 1983), p. 105.

ing of herds."[4] This interpretation is quite traditional among Jewish scholars.[5]

This interpretation seems to get support from the laws of at least one nation contemporary with ancient Israel. The Hittites also imposed varying penalties according to which animal had been stolen. Anyone who stole a bull and changed its brand, if discovered, had to repay the owner with seven head of cattle: two three-year-olds, three yearlings, and two weanlings.[6] A cow received a five-fold restitution payment.[7] The same penalty was imposed on thieves of stallions and rams.[8] A plow-ox required a 10-fold restitution (previously 15).[9] The same was true of a draft horse.[10] Thus, it appears that trained work animals were evaluated as being worth more to replace than the others. Anyone who recovered a stolen horse, mule, or donkey was to receive an additional animal: double restitution.[11] The original animal that had received training was returned; thus, the thief did not have to pay multiple restitution.

It seems reasonable to conclude that the Bible's higher payment for a sheep or ox is based on the costs of retraining an equivalent animal. But what seems reasonable at first glace turns out to be mistaken.

B. Discounted Future Value and Capitalization

Consider the argument that the higher restitution penalty is related to the increased difficulty of training domestic animals. No doubt it is true that the owner must go to considerable effort to re-train a work animal. But is a sheep a work animal? Does it need training? Obviously not. This should warn us against adopting such an argument regarding any restitution payment that is greater than two-fold.

It is quite true that the future value of any stolen asset must be paid to the victim by the thief. What is not generally understood by non-economists is that *the present market price of an asset already includes*

4. U. Cassuto, *A Commentary on the Book of Exodus,* trans. Israel Abrahams (Jerusalem: The Magnes Press, The Hebrew University, [1951] 1974), p. 282.

5. See the citations by Nehama Leibowitz, *Studies in Shemot*, Part 2 (Jerusalem: World Zionist Organization, 1976), p. 364.

6. "Hittite Laws," paragraph 60. *Ancient Near Eastern Texts Relating to the Old Testament*, ed. James B. Pritchard, 3rd ed. (Princeton, New Jersey: Princeton University Press, 1969), p. 192.

7. *Ibid*., paragraph 67.

8. *Ibid*., paragraphs 61, 62.

9. *Ibid*., paragraph. 63.

10. *Ibid*., paragraph 64.

11. *Ibid*., paragraph 70.

its expected future value. Modern price theory teaches that the present price of any scarce economic resource reflects the estimated future value of the asset's net output (net stream of income, or net rents), discounted by the market rate of interest for the time period that corresponds to the expected productive life of the asset.[12] For example, if I expect a piece of land to produce a net economic return (rent) equivalent to one ounce of gold per year for 1,000 years, I would be foolish to pay 1,000 ounces of gold for it today. The present value to me of my thousandth ounce of gold is vastly higher than the present value to me of that thousandth ounce of gold a thousand and one years in the future. When offering to buy the land, I therefore discount that expected income stream of gold by the longest-term interest rate on the market. So do all my potential competitors (other buyers). The cash payment for the land will therefore be substantially less than the expected rental payments of 1,000 ounces of gold.

This discounting process is called *capitalization*. When we capitalize something, we pay a cash price—an actual transaction or an imputed estimation—for a future stream of income. Capitalization stems from the fact, as Rothbard argued, that "Rents from any durable good accrue at different points in time, at different dates in the future. The capital value of any good then becomes the sum of its expected future rents, discounted by the rate of time preference for present over future goods, which is the rate of interest. In short, the capital value of a good is the 'capitalization' of its future rents in accordance with the rate of time preference or interest."[13] This is not a difficult concept to grasp; unfortunately for human freedom and productivity, very few people have ever heard about it.

What is most important to understand is that this discounting process for time applies to *all* capital goods (including durable consumer goods) in the market; it is not simply the product of a money economy. Monetary exchanges are as bound by the process of discounting expected future income (rents) as are all other transactions. Put a different way, *the phenomenon of interest is basic to human action; it is not the product of a money economy*.

If economists could persuade people of this fact, there would be less freedom-restricting legislation such as usury laws. Governments

12. Murray N. Rothbard, Man, *Economy, and State* 2nd ed. (Auburn, Alabama: Mises Institute, [1962] 2009), ch. 7.

13. Murray N. Rothbard, Introduction; Frank A. Fetter, *Capital, Interest, and Rent: Essays in the Theory of Distribution* (Kansas City, Kansas: Sheed Andrews and McMeel, 1977), p. 13.

sometimes pass usury laws that establish a price ceiling on legal interest rates. These laws are almost always applied only on monetary transactions. As with any price control, a usury law will reduce the number of transactions at the coercively fixed price. It will reduce the supply of loanable funds, because lenders do not wish to loan money at an artificially undervalued rate of return.[14] Usury laws are the destroyers of civilization, for they impede the free flow of capital. Indeed, if they could be fully enforced, usury laws that prohibit all interest payments would make impossible the creation of capital goods, for capital goods are nothing more than human labor (including intellectual insight) combined with raw materials over time.[15] All three must be paid for: labor (wages), raw materials (rent), and time (interest). Usury laws deny the legitimate return of the third component of a capital good.[16]

This process of capitalization means that the higher the prevailing interest rate, the smaller the cash payment that a buyer will offer for a piece of land today: the buyer applies a *higher discount* to its expected stream of income.[17] Always bear in mind, however, that no one knows

14. A low official rate of interest makes it appear as though people are discounting future income at a lower rate than is actually the case. Thus, a legislated (or fiat-money-induced) lower rate of interest will make it appear as though buyers are willing offer higher prices for land bought by means of long-term debt contracts (mortgages). But this is an illusion created by the government's usury law. In the case of property sold by a seller who is willing to finance the sale by accepting a long-term debt contract from the buyer, he will have to accept a lower price if the market's true rate of interest exceeds the official interest rate ceiling; otherwise the buyer will not buy. A usury law, like any price control, is analogous to placing a limit on a thermometer's scale. A cap on a thermometer does not reduce the fever of the sick person; it simply keeps people from assessing the true conditions. A usury law creates an illusion of a lower rate of discount than market transactors voluntarily agree upon.

15. Rothbard, *Man, Economy, and State*, ch. 6.

16. There is no surer way to identify a crackpot theory of economics than to examine the economist's theory of interest is. If he denies the legitimacy of interest in morally legitimate profit-seeking transactions, he is not an economist; he is a monetary crank. If he denies interest as a theoretically inescapable tool of economic analysis, he is a true crackpot, as nutty as a man who promotes the idea of the possibility of a perpetual motion machine. But he is far more dangerous: legislators do not listen to "scientists" who would propose making illegal all machines except perpetual motion machines. Legislators have on occasion passed usury laws that are based on the idea that interest is illegitimate. The most precise discussion of interest remains Eugen von Böhm-Bawerk's classic study, *History and Critique of Interest Theories* (1884), which is volume 1 of *Capital and Interest*, 3 vols. (South Holland, Illinois: Libertarian Press, 1959).

17. If we expect a lower rate of interest in the future than presently prevails, we will be willing to pay the prevailing cash price, since the annual rate of return will be discounted subsequently by a smaller number. Thus, we buy today at a nice, fat "discount for cash," and we will be able to sell the property later on for a smaller discount for cash

for certain what the future value of an asset's output will be, nor does anyone know precisely how much the interest rate will fluctuate over the expected productive life of the asset. Obviously, no one is sure just what the productive life of any asset will be. Market forecasting involves a great deal of uncertainty.

Uncertainty is the origin of what some economists call entrepreneurial or "pure" profit.[18] When the estimates of the various competing entrepreneurs—market forecasters-investors[19]—are brought to bear in the capital goods markets, the outcome is a price for any capital asset.[20] Today's demand is a composite of demand for present use (shear, kill, and eat a sheep today) and future use (shear a sheep repeatedly over several years and then kill and eat it). Today's price is the product of the competitive interaction between *today's demand*—which includes an estimation of future demand and an estimation of future supply—and *today's supply*.

The present price of any scarce economic resource already includes its expected future price, discounted by the applicable period's market rate of interest.[21]

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when the rate of discount (interest) drops. If we expect rates to rise, we will only buy at less than the prevailing cash market price, which means, of course, that we will not be able to buy it, since the owner can sell it for more to someone else. The new buyer will then suffer economic losses, if our expectation is correct. He will get a smaller "discount for cash" when he buys today, and if he wants to sell later on, he will have to accept a larger discount, since the rate of interest will have risen. The market value of his land will drop.

18. Frank H. Knight, *Risk, Uncertainty, and Profit* (Boston: Houghton Mifflin, 1921). See also Gary North, *Sovereignty and Dominion: An Economic Commentary on Genesis* (Dallas, Georgia: Point Five Press, [1982] 2012), ch. 32.

19. Some economists distinguish between the capitalist owner-investor and the future-predicting entrepreneur. I have not found this distinction particularly helpful. A forecaster who does not invest capital is not a participant in the market. If someone invests in terms of what the capital-deficient forecaster has said, then the investor becomes the significant participant. Like the race track tout who refuses to invest his own money, and who therefore has no effect on the odds at the ticket window unless he gets someone to bet in terms of his forecasts, so is the entrepreneur who is not a capitalist. Both are economically irrelevant in practice. I prefer to avoid distinctions that are irrelevant in practice. For examples of this distinction, see Israel Kirzner, *Competition and Entrepreneurship* (Chicago: University of Chicago Press, 1973), pp. 47–52; Henry Manne, *Insider Trading and the Stock Market* (New York: Free Press, 1966), pp. 117–19.

20. There can be various prices, depending on market information concerning other buyers and sellers, including substitute producer goods, as well as transportation costs, insurance rates, and so forth. But the tendency of competition is to produce a single market price for a given piece of equipment in a particular geographical region.

21. The prevailing rate of interest for loans of any given duration, like the prevailing price of any asset, is the product of the best guesses of entrepreneurs (speculators) concerning the future of interest rates of that duration.

C. The Economics of Restitution

Having said this, I now consider the economics of restitution. The task of the judges in estimating a morally legitimate restitution payment is easier than it seems. Judges can safely ignore the question of just how much the future value of a stolen asset might be. The best experts in forecasting economic value—entrepreneurs—have already provided this information to the judges, all nicely discounted by the market rate of interest. The judges need only use *existing market prices* in order to compute restitution payments.

A restitution payment is normally twice the prevailing market price of the asset. When the stolen ox is returned by the authorities to the owner (the thief neither slaughtered it nor sold it), the thief pays double restitution. "If the theft be certainly found in his hand alive, whether it be ox, or ass, or sheep; he shall restore double" (Ex. 22:4). Rushdoony followed the traditional rabbinical interpretation when he argued that this 100% penalty above the market price is the minimum amount by which the thief expected to profit from his action.[22] The thief must return the original beast, plus his expected minimum "profit" from the transaction, namely, the market value of the stolen beast. He forfeits that which he had expected to gain. Maimonides wrote of the requirement that the thief pay double: "He thus loses an amount equal to that of which he wished to deprive another."[23] Akedat Yizhak concurred: "The thief is treated differently from the one who causes damage. The latter who caused damage through his ox or pit did not intend to deprive his fellow of anything. He is therefore only required to make half or total restitution. The thief who deliberately sets out to inflict loss on his fellow deserves to have a taste of his own medicine—to lose the same amount that he deprived his fellow of. This can only be achieved through double restitution."[24] This is analogous to the perjurer who is subject to the judicial penalty which his lie, had it been believed by the judges, would have imposed on the innocent person (Deut. 19:16–21).[25]

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22. Rushdoony, *Institutes*, p. 460.

23. Moses Maimonides, *The Book of Torts*, vol. 11 of *The Code of Maimonides*, 14 vols. (New Haven, Connecticut: Yale University Press, [1180] 1954), "Laws Concerning Theft," II:I:4, p. 60.

24. Cited by Leibowitz, *Studies in Shemot*, p. 362.

25. This section of Deuteronomy is explicitly a case-law application of the "eye for eye" principle.

1. Victim's Rights

"If a man shall steal an ox, or a sheep, and kill it, or sell it; he shall restore five oxen for an ox, and four sheep for a sheep" (Ex. 22:1). What if a stolen sheep or ox had been sold by the thief? The thief may know where the animal is. If the authorities convict him of the crime, would he be given an opportunity to buy back the stolen animal and return it to the owner, plus the 100% penalty, and thereby avoid the four-fold or five-fold restitution penalty? This would seem to violate the third goal of proportional restitution (see below): increasing the risk for thieves who steal sheep or oxen, and who then dispose of the evidence by destroying them or selling them, thereby making it more difficult to convict them in court. The thief would still have to pay the four-fold or five-fold penalty, *unless the victim decides otherwise*. The fundamental judicial principle here is *victim's rights*. The victim decides the penalty, up to the limits of the law.

The victimized original owner should always have the authority to offer the convicted criminal an alternative that is more to the victim's liking. Perhaps he is emotionally attached to the missing ox, especially if he personally trained it. He may even be attached emotionally to the stolen sheep—less likely, I suspect, than attachment to an ox that he had personally trained. What if he offers to accept double restitution if (1) the criminal will tell him where the sold beast is, and (2) the beast is returned to him alive? What if the thief then tells the victim and the civil authorities where the missing beast is? The authorities would then compel the new owner—who, legally speaking, is not truly an owner, as we shall see—to return the animal to the original owner.

The buyer of the stolen beast now has neither beast nor the forfeited purchase price. He has become the thief's victim. The thief therefore owes him some sort of restitution payment. The question is: How much? This is a difficult question to answer. It would be either a 20% penalty or a 100% penalty. I believe that it is a 20% penalty.

2. Timely Confession Receives Its Appropriate Reward

Here is my reasoning. Say that the convicted thief confesses his crime of having either sold or slaughtered the stolen beast. The court is not sure which he did, but the penalty is the same in either case: four-fold (sheep) or five-fold (ox) restitution. In an attempt to persuade the original owner to accept the return of his animal plus a 100% penalty, he now confesses that he sold it. Say that the owner

agrees to accept two-fold restitution if the thief can get the animal back (the victim need not consent to this). The thief must now return the stolen beast. He goes to the buyer and tells him that the animal was stolen and must be returned to the original owner. He now also owes the victimized buyer the purchase price of the beast, plus a penalty payment of 20% (Lev. 6:2–5).[26]

If the initial buyer has already sold the beast, then it is the responsibility of the thief, not the buyer, to trace down its present location. The person who has final possession when the state intervenes and requires him to return it to its original owner is the defrauded buyer to whom the thief owes the restitution payment. Because the "bundle of rights" associated with legal ownership could not be transferred by the thief to the various buyers, the final buyer has no legal claim on the animal. He is in receipt of stolen goods.

By cooperating with the original victim, the thief may be able to reduce his overall liability. Instead of paying the original owner five-fold restitution for an ox, he now pays less. First, the stolen beast is returned to the true owner: basic restitution. Second, the thief then must pay that person the equivalent value of the beast. Third, he also owes the defrauded purchaser the return of his purchase price plus a penalty of 20%. Thus, he pays 3.2-fold restitution, plus the cost of locating and transporting the beast, rather than five-fold or four-fold restitution. Obviously, the thief is better off if he cooperates with the true owner, and tells him who bought the stolen ox or sheep from him.

Why assume that the thief only owes the victimized buyer 20%? Because biblical law recognizes that thieves have *better information* about what they did than other people do. It is best for the law to offer thieves a reduced penalty for confession in order to elicit better information from them before the costs of the trial must be borne. To encourage the criminal to tell the truth, there has to be a threat hanging over him: the possibility that someone with the missing information will come to the judges and present it. Thus, if the thief remains silent about the person who bought the sheep or ox, he bears greater risk.

3. The Silent Thief

A silent thief faces an additional threat. Assume that the original owner demands four-fold (sheep) or five-fold (ox) restitution. Still,

26. Gary North, *Boundaries and Dominion: An Economic Commentary on Leviticus*, 2nd ed. (Dallas, Georgia: Point Five Press, [1994] 2012), ch. 7.

the thief says nothing because he knows that if he admits that he sold the beast, he will also have to pay the victimized buyer 120%, yet the original owner may nevertheless refuse to deal with him, and may demand (as is his legal right) either four-fold or five-fold restitution. Once the thief has sold a stolen a sheep or ox, the victim can legally demand the higher penalty payment. The victim is owed the four-fold or five-fold restitution whether or not the thief locates the stolen beast, buys it back, and returns it to its original owner. *The very act of selling a stolen ox or sheep invokes the law's full penalty*. It is very much like the crime of kidnapping. The family of the kidnapped victim, or the judge, or the jury can legally insist on the death penalty even if the kidnapper offers to identify the person to whom the victim had been sold into bondage.

Why would the thief remain silent about the whereabouts of the stolen animal? One reason might be his fear of revenge from an accomplice in the crime. Laying this motivation aside, let us consider other possible motivations for the thief's remaining silent. First and foremost, the thief may believe that he will not be convicted of the crime. After all, the beast is missing. It is not in the thief's possession. Second, he may believe that the victim is hard-hearted and will insist on the maximum restitution payment even if the thief can get the beast back by identifying the defrauded buyer and paying him the purchase price plus a penalty payment of 20%.

He remains silent. He may be convicted anyway. If so, he now faces a new problem: he not only owes four-fold or five-fold restitution to the victim, he could also wind up owing the victimized buyer whatever the buyer paid him for the stolen animal. Why? Because the victimized buyer may later discover that he has purchased a stolen beast. If he then remains silent, he breaks the law. He is a recipient of stolen goods. He has become an accomplice of the thief. His silence condemns him. Additionally, he may feel guilty because he is not its legal owner.

How can the defrauded buyer escape these burdens? He can go to the original owner, who has already received full restitution from the thief (or from the person who has purchased the thief as a slave), and offer to sell the animal back to him. Once the victimized buyer identifies himself, the thief now owes restitution to the defrauded buyer: double restitution, minus the purchase price that the defrauded buyer receives from the original owner. The thief has stolen from the buyer through fraud. As is the case with any other victim of unconfessed

theft, the defrauded buyer is entitled to double restitution from the thief. Therefore, as soon as the thief gets through paying his debt to the original owner, he then must pay the victimized buyer the penalty payment.

If the original owner declines to buy the beast, the buyer becomes its legal owner. The original owner does not want it back. He has also been paid: restitution from the thief. But the defrauded buyer remains a victim. He keeps the beast, but he is also entitled to restitution from the thief equal to the original purchase price charged by the thief.

If the thief confesses before the trial begins, he can avoid the risk of the extra payment to the defrauded buyer. Even if the vcictim demands four-fold or five-fold restitution, by paying it, the thief thereby becomes the owner of the beast. *The criminal's act of timely confession, plus his aggreement to pay full restitution to the victim, atones judicially for the theft.*[27]

But what about the defrauding of the buyer? The confessed thief would owes the buyer a restitution payment of 20% of the purchase price, because he had involved the buyer in an illegal transaction. Having repaid both owner and buyer, he has legitimized the new ownership arrangement. The buyer has gained full legal title to the animal plus restitution, so he is no longer a defrauded buyer. He now has no additional complaint against the thief. He may not demand any additional restitution payments.

Without confession and restitution, the thief would owe the buyer at least 100% restitution if discovered, which is an important economic incentive in getting the buyer to identify himself. Thus, the thief's silence at the trial regarding the existence of a defrauded buyer hangs over him continually.[28]

Let us assume that he is convicted. He pays his maximum restitution to the victim. He still has an economic incentive to confess. He tells the judges that he had sold the animal. He tells them who the defrauded buyer is. He now owes the defrauded buyer the 20% restitution payment. This is better than paying the defrauded buyer 100% (or two-fold restitution minus any re-purchase price from the original

27. Obviously, I am speaking here only of the earthly court. Atonement means "covering."

28. If the victimized buyer waits for several years before identifying the stolen beast, the court might decide that the stolen beast has aged too much, and that it constitutes half of the payment owed. Still, the thief would have to make the 100% penalty payment to him.

owner), should the buyer learn that the beast was stolen property and decide to confess to the original owner or the judges.

Biblical law puts a premium on timely confession. The criminal who confesses receives a lighter penalty than the criminal who refuses to confess, and who is then subsequently convicted.[29] There is an economic incentive for him to confess. There is also an economic threat if he refuses to confess. The possibility of two-fold restitution provides an incentive for a defrauded buyer to reveal the existence of the stolen animal to the original owner. The Bible's penalty structure for theft provides economic incentives for all parties to present accurate information to the civil authorities. The Bible recognizes that accurate information is not a zero-price resource.

4. Considering an Alternative Arrangement

If there were no risk to the thief attached to remaining silent, what would be the thief's incentive to tell the owner that he knows where the stolen beast is? Assume that the thief owes no mandatory penalty payment to the defrauded buyer once he has paid restitution to the victim. He pays full restitution to the owner, and the defrauded buyer then hears about this, realizes that he has purchased stolen property, and comes to the owner. He offers to sell back the missing beast to the owner at the market price the beast was worth to the owner when the beast was stolen (presumably, the price he paid to the thief). If the thief owes nothing to the defrauded buyer, he is still out only five-fold restitution by having concealed evidence.

What is wrong with this interpretation of the restitution statutes? Answer: the thief has entangled the buyer in an illegal transaction that was inherently filled with uncertainty for the buyer. The latter might have been convicted of being a "fence"—a professional receiver of stolen goods. He has therefore been defrauded by the thief. He deserves restitution.

What if the original owner says that he does not want to buy the beast from the defrauded buyer? The buyer has now in effect purchased the beast from its rightful owner. He now owns the "bundle of rights" associated with true ownership. But the thief has nevertheless exposed him to the discomfort of being involved in an illegal

29. In modern American jurisprudence, plea bargaining is used by defense attorneys to reduce their clients' sentences by persuading criminals to confess to milder crimes than they actually committed. In biblical law, the criminal also is given an opportunity to escape a heavier sentence by confessing before the trial; the confessed crime, however, remains the same.

transaction. Shouldn't the thief still owe the seller a 100% restitution payment? My assessment of the principle of victim's rights leads me to conclude that biblical law does in principle allow the defrauded buyer to come to the judges and have them compel the thief to pay him 100% of the price he had paid the thief. This has nothing to do with whether he has sold the beast to the original owner or whether the owner has allowed him to retain legal possession of it.

5. Transferring Lawful Title

Why must we regard the sale of the animal as fraudulent? Why can the authorities legitimately demand that the purchaser return the animal to the original owner? Because the thief implicitly and possibly explicitly pretended to be transferring an asset that he did not possess: *lawful title*. The thief did not possess lawful title to the property. This illuminates a fundamental principle of biblical ownership: *whatever someone does not legally own, he cannot legally sell*. Ownership is not simply possession of a thing; it is possession of certain *legal immunities* associated with the thing. It involves above all the *right to exclude*. According economist-legal theorist-judge Richard Posner: "A property right, in both law and economics, is a right to exclude everyone else from the use of some scarce resource.[30] This right to exclude was never owned by the thief; therefore, he cannot transfer this bundle of legal immunities to the purchaser. The purchaser can legally demand compensation from the thief, but he does not lawfully own the stolen item. The civil authorities can legitimately compel the buyer to transfer the property back to the thief, who then returns it to the original owner, or else compel him to return it directly to the original owner.

The explicit language of the kidnapping statute provides us with the legal foundation of this conclusion regarding the transfer of ownership. "And he that stealeth a man, and selleth him, or if he be found in his hand, he shall surely be put to death" (Ex. 21:16). Even to have a stolen man in your possession was a capital crime, unless you could prove that you did not know that he was stolen. Just because a kidnapper sold you a stolen person as a slave did not mean that this person would remain in your possession as a slave. The same is true of other property.

English common law does not recognize this biblical standard. Receiving stolen goods was not made a crime by statute until the

30. Richard A. Posner, *The Economics of Justice* (Cambridge, Massachusetts: Harvard University Press, 1983), p. 70.

nineteenth century. Common law had recognized no such crime; it took statute law to make it a crime.[31] While it is no doubt true that it is expensive to research every title before making a purchase, especially in a pre-modern society, the responsibility to do so is biblically inescapable if the buyer wishes to reduce his risk of purchasing stolen goods—goods that must be returned to the original owner. Not only is the childhood chant of "finders, keepers; losers, weepers" not biblical, neither is common law's "buyers, keepers; victims, weepers." A far better rule is the traditional *caveat emptor*: let the buyer beware.

What if the thief has already spent the purchase money, and is unable to repay the buyer? The victim agrees to accept two-fold restitution if the original beast is returned to him unharmed. He owes the restitution payment (the animal) to the original owner, plus the penalty; he also owes double restitution to the defrauded buyer. It will take him years to repay. Who has first claim on the thief's money? The original owner does. He made the offer to accept a reduced payment from the thief. Without this offer, he would have been entitled to four-fold (sheep) or five-fold (ox) restitution. For him to grant legal relief to the thief in exchange for information from the thief, he will presumably want at least double restitution.

The defrauded buyer has had to forfeit both the purchase price and the stolen animal, which must be returned to the true owner. The initial claim to restitution belongs to the owner of the beast, which has now been returned to him, leaving the purchaser with neither money nor beast. The defrauded buyer has now become the primary economic victim of the thief. This dual position as *secondary legal victim* but *primary economic victim* imposes added risks on buyers: they must take special care to see to it that the goods they purchase are accompanied by valid titles. If the original owner is willing to bargain with the convicted thief, the purchaser then becomes the major loser. Legal initiative lies with the initial victim of the theft.

D. Protecting the Victims

We think of the criminal's victims as being people who have lost their animals or money. But there are other victims: the animals themselves. This is analogous to the crime of kidnapping. The restitution sys-

31. Wayne LaFave and Austin Scott, Jr., *Handbook on Criminal Law* (Minneapolis, Minnesota: West, 1972), pp. 681–91: "Receiving Stolen Property." My thanks to Prof. Gary Amos for this reference.

tem that the Bible establishes for oxen and sheep reflects this special concern by God for helpless animals. What makes sheep and oxen special is their status in the Old Testament as symbolically helpless animals. So, biblical law protects both the animals and their owners. Let us consider each in turn.

Why the requirement of five-fold restitution for a slaughtered or sold ox? Oxen require training, meaning a capital investment by the owner, in order to make them effective servants of man in the tasks of dominion, but so do other animals, such as horses and donkeys, yet only two-fold restitution is required for them. Also, a thief who is found with a living ox in his possession pays only double restitution. What makes a slaughtered or sold ox different? Answer: *the ox is symbolic of the employed servant*. This symbolism has more to do with its five-fold restitution penalty than the value of its training does.

The law forbids the muzzling of oxen when they are working in the field (Deut. 25:4).[32] Paul cited this verse on two occasions: first, to make the point that God cares for His people, and that our spiritual labors will not be in vain (I Cor. 9:9);[33] second, to point out that the laborer is worthy of his reward, and that elders in the church are worthy of double honor (I Tim. 5:17–18).[34] It pays to train an ox, just as it pays to train human workers in their jobs. Unquestionably, a trained ox is worth more to the owner than an untrained steer, just as a trained worker is worth more than an unskilled worker, and just as an elder is deserving of double honor (payment). Furthermore, the ox is a dominion beast, but the steer is only a source of food and leather. The ox is productive until the day it is killed by man or beast; the steer is simply fattened for the slaughter.

Sheep are very different from oxen. They are stupid animals. Shepherds care for them, sheep dogs monitor their movements, but wise men do not invest a lot of time and energy in trying to train them for service. They are not active work animals like oxen, which pull plows; they are far more passive. A sheep is in fact the *classic passive animal*—an animal whose main purpose in life is to get *sheared*. They are helpless. For this reason, they are symbolic in the Bible of the poor.[35]

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32. Gary North, *Inheritance and Dominion: An Economic Commentary on Deuteronomy*, 2nd ed. (Dallas, Georgia: Point Five Press, [1999] 2012), ch. 63.

33. Gary North, *Judgment and Dominion: An Economic Commentary on First Corinthians*, 2nd ed. (Dallas, Georgia: Point Five Press, [2001] 2012), ch. 11.

34. North, *Hierarchy and Dominion*, ch. 8.

35. James B. Jordan, *The Law of the Covenant: An Exposition of Exodus 21–23* (Tyler, Texas: Institute for Christian Economics, 1984), pp. 267–69.

How do we make sense of the four-fold restitution payment for a stolen sheep that is subsequently killed or sold by the thief? Why is this loss (as indicated by the size of the restitution payment) so great to the owner, compared to the double restitution payment he receives if the stolen sheep is restored to him by the thief? Economic analysis of a sheep's output does not throw much light on this problem, except in a negative sense: there is no strictly economic reason. A beast of burden such as a donkey has to be trained, and was unquestionably a valuable asset in the Old Testament economy. So was a horse. Yet neither slaughtered horses nor slaughtered donkeys are singled out in the law as entitling their owners to four-fold or five-fold restitution. What is so special about a sheep? Is its wool production that much more valuable than the economic output of a horse or donkey? Clearly, the answer is in the negative. We are forced to conclude that the distinguishing characteristic between a slaughtered stolen donkey and a slaughtered stolen sheep has nothing to do with the comparative economic value of each beast's output. Instead, it has a great deal to do with the sheep's *symbolic subordinate relationship to the owner*.

E. Of Sheep and Men

In the Bible, animals *image* man.[36] Sheep are specifically compared to men throughout the Bible, with God as the Shepherd and men as helpless dependents. The twenty-third psalm makes use of the imagery of the shepherd and sheep. David, a shepherd, compared himself to a sheep, for he described God as his shepherd (Ps. 23:1). Christ called Himself the "good shepherd" who gives His life for His sheep (John 10:11). He said to His disciples on the night of His capture by the authorities, citing Zechariah 13:7, "All ye shall be offended because of me this night: for it is written, I will smite the shepherd, and the sheep of the flock shall be scattered abroad" (Matt. 26:31). He referred to the Jews as "the lost sheep of the house of Israel" (Matt. 10:6), echoing Jeremiah, "Israel is a scattered sheep" (Jer. 50:17a) and Ezekiel, "And they were scattered, because there is no shepherd: and they became meat to all the beasts of the field, when they were scattered" (Ezek. 34:5). Christ spoke of children as sheep, and offered the analogy of the man who loses one sheep out of a hundred. The man searches diligently to locate that one lost sheep and rejoices if he finds

36. Animals in men's image: *ibid.*, p. 122. He cited Prov. 6:6; 26:11; 30:15, 19, 24–31; Dan. 5:21; Ex. 13:2, 13. When I use the noun "image" as a verb, I am reminded of one cynic's remark: "There is no noun in the English language that cannot be verbed."

it. "Even so it is not the will of your Father which is in heaven, that one of these little ones should perish" (Matt. 18:14).

1. Helpless Sheep

It is thus the *helplessness* of sheep rather than their value as beasts of burden or dominion that makes four-fold restitution mandatory.[37] Shepherds regard sheep as their special responsibility. The position of sheep is therefore unique. *Sheep are representative of the utter helplessness of men*. An attack on the sheep under a man's control strikes at his position as a covenantally responsible steward. David risked his life to save a lamb (or perhaps lambs) captured by a bear and a lion, and he slew them both (I Sam. 17:34–36), taking the lamb, apparently unharmed, out of the mouth of the lion: "I caught him by his beard" (v. 35). Just as God had delivered him out of the paw of both lion and bear, David told Saul, so would He deliver him out of the hand of Goliath (v. 37). Again, David was comparing himself (and Israel) with the lamb, and comparing God with the shepherd. Thus, the recovery of a specific lost or stolen sheep is important to a faithful shepherd or owner, not just a replacement animal.

Perhaps the best example of sheep as a symbol for defenseless humans is found in Nathan's confrontation with King David concerning his adultery with Bathsheba, wife of Uriah the Hittite. Nathan proposed a legal case for David to judge. A rich man steals a female lamb from a poor neighbor, and then kills it. "And David's anger was greatly kindled against the man; and he said to Nathan, As the Lord liveth, the man that hath done this thing shall surely die: And he shall restore the lamb fourfold, because he did this thing, and because he had no pity" (II Sam. 12:5–6). Then Nathan replied to him, "Thou art the man." Uriah had been the neighbor; Bathsheba is the ewe lamb who, biblically speaking, has been killed, the death penalty being applicable in cases of adultery (Lev. 20:10).

David recognized that the four-fold restitution was applicable in the case of stolen and slaughtered sheep. But in fact, Nathan was not talking about a lamb; he was talking about a human being. He used

37. Maimonides ignored all this when he insisted that if a thief "butchers or sells on the owner's premises (an animal stolen there), he need not pay fourfold or fivefold. But if he lifts the object up, he is liable for theft even before he removes it from the owner's premises. Thus, if one steals a lamb from a fold and it dies on the owner's premises while he is pulling it away, he is exempt. But if he picks it up, or takes it off the owner's premises and it then dies, he is liable." Maimonides, *Torts*, "Laws Concerning Theft," II:II:16, p. 67.

the symbol of the slaughtered sheep for the foolish woman who consented to the capital crime of adultery. The woman had been entitled to protection, especially by the king. Instead, she had been placed in jeopardy of her life by the king. The king had proven himself to be an evil shepherd.

What was the penalty extracted by God? First, the infant born of the illicit union would die, Nathan promised (II Sam. 12:14). On the seventh day, the day before its circumcision, the child died (v. 18). The next section of Second Samuel records the rape of Tamar by David's son Amnon. Absalom, her brother, commanded his servants to kill Amnon, which they did (II Sam. 13:29). Absalom revolted against David and was later slain by Joab (II Sam. 18:14). Finally, Adonijah attempted to steal the throne, but Solomon was anointed (I Kings 1), and Adonijah tried again to secure the throne by asking Solomon to allow him to marry David's bed-warmer. Solomon recognized this attempt to gain the throne through marriage, and had him executed (I Kings 2:24–25). Thus, four of David's sons died, fulfilling the required four-for-one punishment for his adultery and his murder of Uriah.[38]

2. Shepherds and Sheep

By striking at a man's lawful position of personal stewardship, the sheep-stealer takes an extra risk. It is far less risky to steal gold or silver and then sell it than to steal and sell a sheep; he will pay only two-fold restitution if he is captured for stealing and then selling gold. The sheep-stealer strikes at the very heart of a man's dominion assignment, in which a man has invested love and care on helpless, dependent beasts. *The shepherd's calling (vocation) is the archetypal calling: it points analogically to the cosmic personalism and providential goodness of God*. It is therefore specially defended by biblical law.

We see the archetypal nature of the shepherd's calling in the office of church elder. We call ministers of the gospel "pastors," a word derived from the same root as "pastoral." They are shepherds. Christ three times told Peter that his task would be to feed Christ's sheep (John 21:15–17). Peter later instructed elders of the church to "Feed

38. The Jewish scholar Brichto recognized the connection between Exodus 22:1 and the death of four of David's sons. His comment on the fourth of the four-fold penalty that God imposed on David is pertinent: "The execution of Adonijah, occurring after David's death has, in this context, escaped general notice: even of scholars, who have been conditioned not to count as significant (for biblical man) what happens to a man's son(s) after his demise." Herbert Chanan Brichto, "Kin, Cult, Land and Afterlife–A Biblical Complex," *Hebrew Union College Annual*, XLIV (1973), p. 42.

the flock of God which is among you, taking the oversight thereof" (I Peter 5:2a). The shepherd's role as caretaker and protector is analogous to God's care and protection of the world and Christ's care and protection of His church (John 10).

It is significant that the Israelites had been shepherds of cattle and sheep when they came into Egypt. The Egyptians despised shepherds. Because of this, Joseph instructed his brothers to ask Pharaoh for a separate land, Goshen, where the Hebrews would not come into contact with the Egyptians (Gen. 46:33–34). God's law, delivered so soon after their escape from a land in which their calling was despised, dealt with that occupation and its risks and responsibilities.

The Egyptians had despised shepherds, whose task is to care for flocks. These same Egyptians had placed the Israelites in bondage. The Egyptians were repulsed by an occupation that is based on a covenantal model of God's responsibility for the care and protection of His people. They were also repulsed by the concept of a society based on the idea of a ruler's covenantal responsibility for the care and protection of men. This hostility is understandable: Egypt was a bureaucratic, tyrannical state.[39] The Hebrews' experience in Egypt was designed by God to teach them that men are not allowed to do to cattle and sheep something that they are unquestionably not to do to other men: treat them unmercifully and carelessly or steal them and illegally slaughter them. Thus, God imposed His four-fold restitution on the Egyptians: He destroyed them.

Sheep, being stupid, are inescapably dependent. They have to trust their master if they are to survive. The shepherd is not to betray this personal trust until it is time to kill the sheep for food or, in Old Testament times, for sacrifice. Christ pointed to the intimate relationship between the shepherd and his sheep: "And when he putteth forth his own sheep, he goeth before them, and the sheep follow him: for they know his voice. And a stranger will they not follow, but will flee from him: for they know not the voice of strangers" (John 10:4–5). When removed from the care of their shepherd, forcibly or otherwise, the sheep become lost.

F. Symbolism or Training?

At this point, I must resort to a somewhat speculative hypothesis in order to make sense out of the four-fold restitution payment for

39. Chapter 2.

a missing or dead sheep and the five-fold restitution payment for a missing or dead ox. I am arguing that the high penalties are imposed because of the symbolic nature of sheep and oxen, although I cannot prove it textually.[40]

To make sense of Exodus 22:1, we have to go beyond considerations of strictly financial profit and loss. Economics as such does not provide a clear-cut answer to a fundamental question: *Why doesn't God's law impose five-fold or four-fold restitution payments for the slaughter or sale of stolen horses or donkeys or other beasts of burden (dominion)*? They require the capital investment of training, just as an ox does. The value of this training is forfeited when the thief cannot return the actual stolen beast to the owner. We might presume that the principle of the four-fold and five-fold restitution payment does, by implication, apply to these other beasts, if they have received training or other capital investments that set them apart from untrained beasts of the same species. Nevertheless, the Bible never says this explicitly. It specifically singles out sheep and oxen. Why?

I see two possible reasons. First, unlike horses, donkeys, and other domesticated animals that might be trainable, sheep and oxen were commonly *slaughtered and eaten*, as they are today. Thus, they need special protection from thieves. A thief who slaughters an ox or sheep is subject to more stringent penalties. The higher penalty tends to restrain him in his blood-letting. This is a more strictly economic argument, one based on the economic effects of the law. Second, both sheep and oxen are *symbolic in the Bible of mankind*: oxen for men of power or office, and sheep for dependent, spiritually helpless people. Oxen are normally peaceful, dominion beasts that are used for plowing the fields, never for war. Sheep are passive creatures that require special care on the part of shepherds. Thus, as archetypes of man in his relationship to God—*creatures in need of care*—oxen and sheep receive special consideration by the law.

Why a five-fold restitution payment for oxen? Why not four-fold? Probably because oxen are beasts of burden and therefore living tools of dominion. They are dependent,[41] though not so dependent as sheep, but they are also symbolic of God's dominion covenant. The number five is associated with the covenant in the Bible. Also, Israel

40. Jordan, *Law of the Covenant*, Appendix G. I discussed my thesis in the present chapter with Jordan prior to the publication of his book, and he expanded on the idea.

41. I believe that the male ox in this case law is castrated and not a bull. Castration reduces its threat to men, yet the animal's strength can still be harnessed for man's purposes. It is more dependent on man than a bull would be.

marched in military formations based on the number five.[42] The number five is associated with dominion. By killing a stolen ox, the thief is symbolically sacrificing another person's economic future for the sake of his own present enjoyment. This is what Satan attempted to do to Adam, and only the grace of God in Christ prevented Satan's successful slaughtering of humanity.

This law of restitution singles out oxen and sheep as being special creatures. Other passages in the Bible do the same. What the stringent restitution penalties of Exodus 22:1 point to is a general principle: *how you treat oxen and sheep is indicative of how you treat other men*. The ox is worthy of his hire; how much more a man! The sheep is helpless, and is deserving of protection; how much more a man! A society whose legal order protects oxen and sheep from thieves who would slaughter them is a society whose legal order is likely also to protect men from oppression, kidnapping, and murder. A biblical social order offers special protection to oxen, sheep, and men.[43]

G. Restitution and Deterrence

We are required by God always to begin our analysis of any problem with the operating presupposition of *the theocentric nature of all existence*. Modern jurisprudence refuses to begin with God. It begins with man and man's needs, and generally progresses to the state and the state's needs. This is why modern jurisprudence is in near-chaos. It is also why the court system is in near-chaos.[44]

1. Deterring God's Wrath in History

Whenever we speak of deterring crime, we must consider first of the deterrence of God's wrath against the community because of the courts' unwillingness to impose God's justice within the community.

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42. James B. Jordan, *The Sociology of the Church* (Tyler, Texas: Geneva Ministries, 1986), pp. 215–16.

43. David Daube's comments on the four-fold and five-fold restitution requirements acknowledge none of this. Instead, he returned to his favorite theme, like a dog returns to its vomit: the "later addition" thesis. He contrasted the two-fold restitution requirement with the four-fold and five-fold requirements. The higher penalties are evidence of an earlier law. "... the older rule makes a rather primitive distinction between theft of an ox and theft of a sheep: for one ox you have to give five, but for one sheep only four. No such distinction occurs in the later rule. Whatever kind of animal you steal, you have to restore two for one." Daube, *Studies in Biblical Law* (Cambridge: At the University Press, 1947), pp. 94–95. He used a similar line of argumentation to distinguish Exodus 21:28–31 from 21:35–36: *ibid*., pp. 86–87.

44. Macklin Fleming, *The Price of Perfect Justice* (New York: Basic Books, 1974).

The civil government is required by God to seek to deter crimes because all crimes are above all *crimes against God*. An unwillingness on the part of civil magistrates to enforce God's specified sanctions against certain specified public acts calls forth God's specified covenantal cursings against the community. This threat of God's sanctions is the fourth section of God's covenant; without this covenant, either explicit or implicit, no community can exist.[45] Only when we clearly recognize the *theocentric nature of deterrence*—and when we are ready to seek to have it *recognized publicly in our civil and ecclesiastical statute books*—can we legitimately begin to speak about deterring criminal behavior for the protection of the community.

The Bible does not distinguish between civil law and criminal law. All sins are crimes against God, for they break His law. All public sins must be restrained by one or more of God's covenantal agencies of government: family, church, and state. Certain public transgressions of God's law are specified as acts to be punished by the civil magistrate. In the modern world, we call these acts crimes. (The King James Version uses the word "crime" only twice, and "crimes" only twice.) The civil government enforces biblical laws against such acts. The general guideline for designating a particular public act as a crime is this: if by failing to impose sanctions against certain specified public acts, the whole community could be subsequently threatened by God's non-civil sanctions—war, plague, and famine—then the civil government becomes God's designated agency of enforcement. *The civil government's primary function is to protect the community against the wrath of God* by enforcing His laws against public acts that threaten the survival of the community.

The perverse practice of modern jurisprudence of allowing a person who has been declared legally innocent of a crime to be subsequently sued for damages in civil court by alleged victims cannot be found in the Bible. There is no distinction in the Bible between criminal law and civil law. If the *civil* magistrates are entitled to enforce a rule or a law, then this rule or law should be classified in the modern world under a *criminal* statute. Because the state is not omniscient, God allows self-proclaimed victims of lawless behavior to sue other individuals in the presence of a civil magistrate, which we call civil procedure or torts, but if the state is the lawful agency of enforcement, then we are always talking about criminal acts. Con-

45. Ray R. Sutton, *That You May Prosper: Dominion By Covenant*, 2nd ed. (Tyler, Texas: Institute for Christian Economics, [1987] 1992), ch. 4.

tinued injustice, *if* it can be biblically defined and publicly identified in advance through statute or judicial precedent, because it goes unpunished by the civil government, calls forth the wrath of God on the community.

The Bible encourages the *legitimate division of labor* in identifying all types of criminal behavior, including such acts of injustice as breaking contracts or polluting the environment. The Bible recognizes that the state is not God. It is not omniscient. The initiation of public sanctions against all criminal acts therefore must not become a monopoly of civil officers. Citizen's arrest and torts—where one person sues another in order to collect damages—are modern examples of the outworking of this biblical principle of the decentralization of law enforcement. All government begins with self-government. The bottom-up, appeals court structure of covenant society (Ex. 18)[46] is protected by not requiring that agents of the civil government initiate all of the civil government's sanctions against criminal behavior. Nevertheless, all disputes into which the state can legitimately intervene and settle by judicial decision must be regarded in a biblical commonwealth as criminal behavior. *There is no biblical distinction between criminal law and civil law*.

It is therefore preposterous to argue, as liberal scholar Anthony Phillips argued concerning the Mosaic law, that "A crime is a breach of an obligation imposed by the law which is felt to endanger the community, and which results in the punishment of the offender in the name of the community, but which is not the personal concern of the individual who may have suffered injury, and who has no power to stop the prosecution, nor derives any gain from it."[47] The argument is preposterous because every transgression of the civil law that goes unpunished by the authorities raises the threat of God's judgment on the community, which is why unsolved murders required expiation in the Old Testament: (1) the sacrifice of a heifer (Deut. 21:1–7); and (2) the elders were required to pray, "Be merciful, O Lord, unto thy people Israel, whom thou hast redeemed, and lay not innocent blood unto thy people of Israel's charge. And the blood shall be forgiven them" (Deut. 21:8). The state must regard as crimes against God all public transgressions for which the Bible specifies restitution payments to victims. Such acts are criminal acts against the community.

46. Chapter 19.

47. Anthony Phillips, *Ancient Israel's Criminal Law: A New Approach to the Decalogue* (New York: Schocken, 1970), p. 10.

Why? Because if they go unpunished, God threatens to curse the community. Thus, criminal law in the Bible was not enforced "in the name of the community," but *in the name of God*, so as to protect the community from God's wrath.

2. Restitution to God

Phillips was consistent in his errors, at least; he also argued that Hebrew covenant law was *exclusively* criminal law, meaning that its goal was solely the enforcement of public morals, rather than civil law (torts), in which restitution to the victim was primary.[48] This definition, if correct, would remove from covenant law all biblical statutes that require restitution to victims. He was trying to separate the case laws of Exodus from the Ten Commandments. If believed, this argument would make it far easier for antinomians to reject the continuing validity of the case laws in New Testament times, for the case laws of Exodus and other books rest heavily on the imposition of restitution payments to victims. The antinomians could publicly claim allegiance to the Ten Commandments, but then they could distance themselves from the specific applications of these commandments through the case laws, for they have concluded that the case laws are unconnected to the Decalogue because these are "civil" laws rather than "criminal" laws.[49] Phillips wrote: "But it is the contention of this study that Israel herself understood the Decalogue as her criminal law code, and that the law contained in it, and developed from it, was sharply distinguished from her civil law."[50]

If true, then all you need to do to escape from the covenantal, state-enforced requirements of the Decalogue is to make the Ten Commandments appear ridiculous. This he attempted in Chapter Two. "Initially only free adult males were subject to Israel's criminal law, for only they could have entered into the covenant relationship with Yahweh. . . . But women did not enter into the covenant relationship, and were therefore outside the scope of the criminal law. They had no legal status, being the personal property first of their fathers and then of their husbands."[51] The Decalogue is clearly preposterous,

48. *Ibid.*, pp. 10–11.

49. Phillips says that the "Book of the Covenant," meaning Exodus 21–23, was a product of David's reign, with some of it quite possibly written by David himself. *Ibid.*, ch. 14.

50. *Ibid.*, p. 11.

51. *Ibid.*, pp. 14, 15. He did say that Deuteronomy later made women full members of the covenant. *Ibid.*, p. 25. This is the standard liberal dismemberment of the Penta-

he implied. Presto: modern man is freed from *any* covenantal relationship to God. Man is on his own in the cosmos. He is autonomous. He shall be as God.

His case rests, first and foremost, on his distinguishing of criminal law from civil law in terms of the presence of restitution requirements in civil law. Next, he excluded women from the covenant. Then he turned them into chattel slaves. His tactic is obvious: to make God's law appear ridiculous. But it is Phillips who is ridiculous, not the Bible. Like all humanists, he did not begin with the presupposition of a theocentric universe. He therefore did not begin his discussion of crimes and restitution with the understanding that all crimes are ultimately crimes against God, and all restitution payments belong ultimately to God as the ultimate injured party. It did not occur to him that *all of God's curses are His imposition of restitution payments to Himself as the ultimate Victim*. Because covenant-breakers do not voluntarily repay to God what they owe Him as the innocent victim—the ultimate object of their moral rebellion—He therefore repays them with inescapable final judgment. "Vengeance is mine; I will repay, saith the Lord" (Rom. 12:19b).

All sins are crimes against God. All sins are therefore judged by God: "For the wages of sin is death" (Rom. 6:23a). Each person is a sinner in God's eyes, and therefore a criminal. The key question that must be answered during each person's life on earth—acknowledged by him or not—is this one: Will I allow Jesus Christ's payment of the God-imposed eternal penalty to serve as my substitutionary restitution payment to God, or will I instead choose to ignore the magnitude of this looming restitution payment and cross death's threshold autonomously? Anyone who makes the second choice will spend eternity in God's non-rehabilitative torture chamber.

3. "Victimless Crimes" and Civil Judgment

In the ultimate covenantal sense, it is improper to speak of victimless crimes. Every person who entices another to sin is bringing that person under the threat of God's negative sanctions, in time and in eternity. God therefore threatens the whole community for its failure to impose civil sanctions against such crimes. If there were no threat of God's sanctions against the community for the failure of the magistrates to enforce all statutes assigned by the Bible to the civil

teuch into the hypothetical documents of the play-pretend scribes, J, E, D, P, and their as-yet unidentified accomplices.

magistrates for enforcement, then there would be no biblical justification for sanctions against certain "victimless crimes," identified in the Mosaic law as crimes. Because he rejected the idea of such a covenant, classical liberal economist and legal theorist F. A. Hayek rejected laws against "victimless crimes," saying that they are illegitimate interventions of the civil government, "At least where it is not believed that the whole group may be punished by a supernatural power for the sins of individuals. . . ."[52] But that is the whole point: such a community-threatening God *does* exist.

Many actions that are specified in the Bible as sins are not to be tried and judged by the civil magistrate, but this is not evidence of neglect by God; it is instead *a restraint on the growth of messianic civil government*. The absence of civil penalties against such designated sinful behavior indicates only a postponement of judgment until the sinner's final and eternal restitution payment to God. Through their public enforcement of God's law, civil magistrates warn people of the necessity of obeying God, the cosmic Enforcer: "By the fear of the Lord men depart from evil" (Prov. 16:6b). This legitimate fear is to be both personal and national, for God's punishments in history are imposed on individuals and nations: "If thou wilt not observe to do all the words of this law that are written in this book, that thou mayest fear this glorious and fearful name, The Lord Thy God; then the Lord will make thy plagues wonderful, and the plagues of thy seed, even great plagues, and of long continuance, and sore sicknesses, and of long continuance" (Deut. 28:58–59).

The necessity of making restitution reminds the covenanted nation to fear the God who exacts a perfect restitution payment to Himself on judgment day, and who brings His wrath in history as a warning of the final judgment to come. He brings His wrath either through lawfully constituted civil government or, if civil government refuses to honor the terms of His covenant, through such visible judgments as wars, plagues, and famines. This is why the nation was warned to fear God, immediately after the presentation of the Ten Commandments: ". . . God is come to prove you, and that his fear may be before your faces, that ye sin not" (Ex. 20:20b).

Jesus was not departing from the biblical view of judicial sanctions when He warned: "Fear him which is able to destroy both soul and body in hell" (Matt. 10:28b). Eternal punishment is to serve as the

52. F. A. Hayek, *Law, Legislation and Liberty*, 3 vols. (Chicago: University of Chicago Press, 1973), I, p. 101.

covenantal foundation of all judicial sanctions. Civil government is supposed to reflect God's government. Public punishments deter evil. They remind men: better temporal punishment that leads to repentance (personal and national) than eternal punishment that does not lead to repentance (personal). Repentance is possible only in history.

4. Capital Punishment

Phillips was consistently incorrect when he wrote: "Modern theories of punishment are therefore totally inapplicable when considering reasons why ancient Israel executed her criminals, for the punishment was not looked at from the criminal's point of view. This extreme penalty was not designed to deter potential criminals, nor as an act of retribution, but as a means of preventing divine action by appeasing Yahweh's wrath."[53] If criminal law was "not looked at from the criminal's point of view," then why does the Bible repeatedly refer to the fear of external punishment by the civil authorities as a means of leading men to fear God and to obey His law? "And all Israel shall hear, and fear, and shall do no more any such wickedness as this is among you" (Deut. 13:11).

Deterring future crimes is certainly one of the functions of capital punishment in a biblical law-order. Capital punishment is also an act of retribution and restitution. And, yes, it is also "a means of preventing divine action by appeasing Yahweh's wrath." It is erroneous to argue exclusively in terms of "either-or" when considering the potential social motivations for capital punishment or any other required civil sanction in the Bible.[54]

Capital punishment points to the final judgment as no other civil

53. Phillips, *Ancient Israel's Criminal Law*, p. 12.

54. I do not want to give the reader an inflated opinion of Phillips' importance. He was just another obscure liberal theologian toiling fruitlessly in the barren wilderness of higher criticism. I have included this brief survey of some of his ideas as an example of just how intellectually sloppy liberal theology can be, not because he is an important thinker. He is simply a convenient foil. He is all too typical of a small army of liberal theologians whose works would be immediately forgotten if they had ever been read in the first place. These scholars will eventually make full restitution to God for their efforts to deceive their readers concerning the Bible. Liberal scholars are always looking for a new angle to justify the publication of yet another heavily footnoted, utterly boring, totally useless book, especially books like Phillips', which is a rewritten doctoral dissertation—the most footnoted, boring, and useless academic exercise of all. Doctoral dissertations should be interred quietly, preferably in private, with only the author and close family in attendance. If such interment must be public, then it should be as a summary published in a scholarly journal, where the remains' entombment will seldom be disturbed again. Ashes to ashes, dust to dust.

penalty does. It reminds sinners of the ultimate restitution penalty that God will impose on all those who refuse to accept His Son's payment on their behalf. The civil government acknowledges that its most fearful form of punishment is to speed convicted criminals along into the courtroom of the cosmic Judge. The magistrate announces that there is no way to restore the convicted criminal to fellowship in earthly society. He visibly becomes what he already is in principle: a sinner in the hands of an angry God.

H. Final Judgment

We see the ultimate example of this two-fold aspect of restitution in the final judgment. Satan and his host, both human and angelic, pay for their rebellion with their lives. Their leavening power of corruption in history is reduced to zero. Their assets are transferred to God's people, who inherit the earth. From a biblical standpoint, this transfer of legal title to the world was accomplished by Christ at Calvary.[55] Then the rebels are thrown into the lake of fire (Rev. 20:14–15).

This eternal, continual restitution payment honors God, while it simultaneously acts as the perfect deterrent to crime—a covenantal warning that remains before God's servants, both human and angelic, throughout eternity. Resurrected people will never sin again, whether they are covenant-breakers or covenant-keepers. Righteous people will not choose to sin, and resurrected sinners will not be able to. In the lake of fire there is only impotence. The ability to adhere to any of the terms of the dominion covenant cease when grace ceases, and there is no grace in the lake of fire.

Then why speak of the deterrence effect of eternal damnation? Because God's judgment is covenantal: blessings and cursings (point four of the Biblical covenant).[56] There are always conditional aspects to God's covenant promises, as well as unconditional aspects. The promises of God are part of the structure of the covenant. There will be promises and blessings in the post-resurrection new heaven and new earth. Cursing and blessing are eternal, which reminds everyone of the covenant's conditions. Thus, the lake of fire can be spoken of covenantally as a perfect deterrent, for it deters all God-defying behavior forever. It also complements and reinforces the perfect obedience of covenant-keepers who know perfectly well about the perfect

55. Gary North, *Inherit the Earth: Biblical Blueprints for Economics* (Ft. Worth, Texas: Dominion Press, 1987), ch. 5.

56. Sutton, *That You May Prosper*, ch. 4.

torment of covenant-breakers, with their perfect bodies that possess the terrifying ability, like the burning bush that Moses saw, of not being destroyed by a perfect fire. God's perfection is manifested in His perfect wrath.

It is not God's grace that keeps alive covenant-breakers, with their perfect bodies that are so sensitive to every subtle aspect of their endless torment; it is instead His uncompromising *wrath* that keeps them alive.[57] Covenant promises, conditions, and sanctions are eternally perfect.[58] The soul and body of every covenant-breaker are reunited perfectly at the resurrection, so that each can experience the eternal torments of covenant judgment as unified and fully human. There is no dualism of body and soul in the lake of fire.[59]

Perfect justice brings with it a resurrection life permanently devoid of sin. Furthermore, the punishment perfectly fits the ethical

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57. On this point, I disagree with John Calvin's reference to God's grace in keeping souls alive: "And although the soul, after it has departed from the prison of the body, remains alive, yet its doing so does not arise from any inherent power of its own. Were God to withdraw his grace, the soul would be nothing more than a puff or blast, even as the body is dust; and thus there would doubtless be found in the whole man nothing but mere vanity." Calvin, *Commentary on the Book of Psalms* (Grand Rapids, Michigan: Barker Book House, 1979), Baker's volume VI, p. 138: Ps. 103:15. There is no grace shown by God to the souls of covenant-breakers in hell or the lake of fire. Grace is shown only to the souls of covenant-keepers. Calvin's loose language here was misused by Edward William Fudge in his book-long attempt to deny the biblical doctrine of eternal torment: *The Fire That Consumes: A Biblical and Historical Study of Final Punishment* (Houston, Texas: Providential Press, 1982), p. 74.

58. Fudge attempted to trace Protestantism's doctrine of the immortality of the soul to Calvin, and Calvin's doctrine of the immortality of the soul to Plato. This argument is nonsense, though representative of similar arguments used by heretical theologians to reject Bible doctrines in the name of rejecting Greek speculation, when in fact they have adopted some variation of humanist speculation. The Bible's doctrine of the immortality of the soul and also its doctrine of eternal torment of the wicked are both grounded in the doctrine of the covenant. It is not surprising that Fudge finds in the Calvinist tradition the most tenacious die-hard defense of the doctrine of eternal punishment. Fudge, *ibid*., pp. 26n, 466. There is a reason for this tenacity. Calvinism, more than any other Christian tradition, is grounded in the doctrine of the covenant.

59. Fudge and several of the drifting theologians whom he cited continually refered to the orthodox doctrine of souls in hell as implicitly dualistic. The doctrine of hell is no more dualistic than the traditional doctrine of heaven. The issue is not heaven or hell, for both are temporary way stations for souls until God's final judgment; the issue is the post-resurrection world, where souls and bodies are reunited. Fudge fudged this issue, as he did so many others. He covered his flanks with a whole series of peripheral issues—theological and historical rabbit trails for non-covenant theologians to pursue until exhaustion. The fundamental issue is the covenant: God's eternal dead-end judgment for covenant-breakers. This is the issue Fudge never discussed in chapter 20, "Focusing on the Issue," with its subsection, "Traditional Arguments Summarized." It is not man who is central to discussions of final judgment, but rather God and His eternal covenant.

crime of rebellion against God. It is a punishment whose magnitude God made quite plain from the beginning: "But of the tree of the knowledge of good and evil, thou shalt not eat of it: for in the day that thou eatest thereof thou shalt surely die" (Gen. 2:17). Absolutely proportional restitution at the final judgment creates the conditions necessary to establish a perfect society beyond the final resurrection.

I. *Lex Talionis*

Throughout the section of Exodus that immediately follows the Ten Commandments, we are given case-law applications of these commandments. In these case laws, we discover an operating principle: "an eye for an eye," the *lex talionis*. This principle is the theological foundation of all punishment, and therefore serves as the basis of restitution. This is why God required a living sacrifice, life for life, to atone for mankind's sin. A perfect man had to die in order to atone for the sin of another formerly perfect man, Adam. This is why the author of the Epistle to the Hebrews could write concerning the life and work of Jesus Christ: "For it is not possible that the blood of bulls and of goats should take away sins. Wherefore when he cometh into the world, he saith, Sacrifice and offering thou wouldest not, but a body hast thou prepared me: In burnt offerings and sacrifices for sin thou hast had no pleasure" (Heb. 10:4–6). Again, "Neither by the blood of goats and calves, but by his own blood he entered in once into the holy place, having obtained eternal redemption for us" (Heb. 9:12). This should have come as no surprise to anyone who had read and believed Exodus 21–22. Atonement for sins against God requires more than the slaughter of animals. Slaughtering an animal does not compensate God for man's sin. *The principle of proportional restitution testified from the beginning against the autonomous adequacy of the Mosaic sacrificial system. It pointed to a greater sacrifice to come*. A perfect man would have to die, and more than a perfect man: God's Son.

As history's pre-resurrection society begins to approach, though never attain, the perfect justice of proportional restitution, it will thereby approach, though never attain, institutional perfection.[60] In God's pre-resurrection cultural "earnest" to His people—His down

60. Perfection is an ethical requirement, for each individual and for all covenant institutions. It is a mandatory goal: "Be ye therefore perfect, even as your Father which is in heaven is perfect" (Matt. 5:48). Christ was simply citing an Old Testament principle regarding sanctification, or holiness (Lev. 11:44). Perfection cannot be attained prior to the day of resurrection, however: "If we say that we have no sin, we deceive ourselves, and the truth is not in us. If we confess our sins, he is faithful and just to forgive us our

payment or pledge (Rom. 8:19; Eph. 1:14)—which is the earthly beginning of the new heavens and new earth (Isa. 65:17), people will still die, proving that it will be an era prior to the final judgment, but they will normally live extraordinarily long lives (Isa. 65:20). It will be a period of reduced immorality (Isa. 1:25; 4:2–4), more equitable judgment (Isa. 1:26–27), and greater productivity as a result of universal peace (Isa. 65:22–23). There is an earthly relationship between righteous living (progressive sanctification), godly civil justice, and economic growth.[61]

J. Offsetting Reduced Risks of Detection

The thief who steals a specially protected beast must suffer greater risks for stealing it when compared to any other kind of property. The sheep or ox can easily be slaughtered and eaten. This makes it far more difficult for the civil authorities to discover who the thief is and then prove it in court. Thus, the thief who steals an ox or sheep seems to have a greater likelihood of getting away with the crime. The law therefore imposes far higher penalties in cases of ox-stealing or sheep-stealing. This offsets part of the self-subsidy—the reduction of the risk of detection—that the thief receives when he slaughters the animal, thereby destroying the evidence.

But what about selling the animals? This is the equivalent of kidnapping, for these particular animals represent man. Thus, there is a higher penalty attached to their theft. This higher penalty relates to the *symbolic aspect* of the forbidden act of man-stealing. Selling a useful beast that can be taken into a different part of the country makes it easier for the thief to escape detection. The thief does not wear a stolen jewel or use a stolen tool, which would make it easier to detect his crime locally. The animal, which was under the personal protection of its owner, is separated from the owner permanently. Biblical law therefore stipulates that the thief who does sell the beast is placed under greater risk. Should he be proven to be the thief, he will be required to pay four-fold or five-fold restitution to the victim.

This explanation may seem strained, but it is necessary if we are to make sense of Exodus 22:9, which regulates property placed in trust with a neighbor. If the neighbor loses the goods, they both must go

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sins, and to cleanse us from all unrighteousness. If we say that we have not sinned, we make him a liar, and his word is not in us" (I John 1:8–10).

61. Gary North, *Unconditional Surrender: God's Program for Victory*, 5th ed. (Powder Springs, Georgia: American Vision, [1980] 2010), ch. 3: C–D.

before the civil magistrates. If the neighbor is found guilty, he pays double restitution. "For all manner of trespass, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing, which another challengeth to be his, the cause of both parties shall come before the judges; and whom the judges shall condemn, he shall pay double unto his neighbour."

Why should the neighbor be required to pay only double restitution for a sheep or ox in this case? What about five-fold and four-fold restitution? My answer: because the neighbor cannot conceal the crime in the way that the outsider can when he slaughters or sells the animal. In short, *it is easier for the victimized owner to prove his legal case against a neighbor than it is for him to prove his case against an unknown thief who disposes of the evidence*. Thus, the penalty imposed on the neighbor is double restitution, which is the standard requirement for the theft of all other goods except slaughtered or sold oxen and sheep. Because the owner faces reduced difficulties in recovering his property, and the thief therefore faces increased risk, the penalty payment is reduced.

Conclusion

What will be the marks of civil justice during an era of biblical justice? Victims will see the restoration of their stolen assets, while criminals will see their ill-gotten capital melt away because of the financial burden of making restitution payments. The dual sanctions of *curse and blessing*—part four of the biblical covenant[62]—are invoked and imposed wherever the principle of restitution is honored in the courts, both civil and ecclesiastical. Restitution brings both *judgment and restoration*, which affect individual lives and social institutions.

There are limits to biblical restitution. First, the full value of whatever was stolen is returned by the thief to the original owner. Second, the thief makes an additional penalty payment equal to the value of the item stolen. To encourage criminals to admit their guilt and seek restoration before their crimes are discovered, the Bible imposes a reduced penalty of 20% on those who admit their guilt voluntarily (Lev. 6:2–5).

There are two exceptions to double restitution. The law singles out oxen and sheep as deserving special protection in the form of five-fold and four-fold restitution in cases where the stolen animals

62. Sutton, *That You May Prosper*, ch. 4.

are killed or sold. Because oxen and sheep are symbolic of mankind, the law thereby points to the need of protecting men from oppression and slavery. He is given responsibility over oxen and sheep, implying that he is also given responsibility over other men in various circumstances. To thwart a man in the exercise of his lawful occupation is a crime against dominion man, and is punishable by God.

Proportional restitution is imposed by the civil government as God's lawful representative on earth. The three economic goals of proportional restitution are these: (1) restoring full value to the victim; (2) protecting future potential victims by means of the deterrence effect of the penalty payment (Deut. 13:11): (a) animals, especially those symbolic of man's helplessness (sheep and oxen), and (b) property owners; and (3) offsetting the lower economic risks of detection associated with certain kinds of theft—the slaughter or sale of specially protected edible animals.

Biblical restitution also has at least three civil goals in addition to the three economic goals. The first civil goal of restitution is to make life easier for the law-abiding citizen by fostering external social conditions in which he can live in peace and safety. Peace and safety are the fully legitimate goals of all biblical justice, which God has promised to bring to pass in world history through His church during a future period of earthly millennial peace. The nations will come to God's church ("the mountain of the house of the Lord") in search of true justice (Mic. 4:1–5).

A second civil goal of biblical restitution is to make possible the full *judicial* restoration of the criminal to society after he has paid the victim what he owes him.[63] The state is not to concern itself with the psychological restoration of the criminal, the victim, or society in general. The state's jurisdiction is strictly limited to the realm of the judicial: *restitution*. The psychological state of the criminal is between himself and God, as is the psychological state of the victim. Nevertheless, as in the case of the salvation of any individual by God's grace, judicial restoration is the first step toward psychological restoration.

The third civil goal of biblical restitution is not intuitively obvi-

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63. The modern American practice of never again allowing convicted felons to vote is clearly immoral. Under biblical law, a convicted criminal becomes a *former* convicted criminal when he has made full restitution to his victims. In this sense, he is "resurrected" judicially. After he has paid his debt to his victims, he must be restored to full political participation. To segregate the former convicted criminal from any area of civic authority or participation is to deny judicially that full civil restoration is made possible by means of God's civil law.

ous, but it may be the most important goal for the modern world. A system of biblical restitution is required in order to reduce the likelihood that citizens will come to view the civil government as an agency that lawfully initiates programs leading to personal or social transformation. The state's task is to assess the economic damage that was inflicted on the victim and then impose judgment on the convicted criminal that will reimburse the victim for his loss, plus a penalty payment. Normally, this means double restitution. The state is not an agency of creative transformation. It is not a savior state. Men should not seek to make the state an agency of social salvation. It is supposed to enforce biblical civil law—no more, no less. The state is not supposed to seek to make men righteous; its God-assigned task is to restrain certain specified acts of public evil. Theft is one of these acts.

Civil government is an agency of visible judgment in history. Justice demands judgment. The judgments handed down by civil government acknowledge the historic judgments of God, as well as point to the final judgment of God. The goal of civil justice is always restoration; restoration through restitution or restoration through execution. This two-fold system of civil judgment also characterizes God's judgments, which are equally judicial.

When God deals with His people in a harsh way in history, it is a means of restoration: *judgment unto restoration*, not judgment unto destruction. The atoning work of Jesus Christ at Calvary points the way to a better world in history; restitution has been made to God by the only possible ethically acceptable representative of man, the Son of God. The Christian's expectation of better earthly times is therefore valid. Christ's restitution payment has been made, on earth and in history.

One thing is needed to translate His atonement into social reality: the progressive transformation of the criminal justice system in terms of biblical law, something that cannot take place until the humanistic theology which undergirds the existing system of justice is replaced by biblical orthodoxy. Anyone who denies that such a progressive transformation of the criminal justice system is possible in history is thereby also denying that the atoning work of Christ can be manifested progressively in history. Anyone who denies that such a progressive transformation of the criminal justice system will actually take place in history is thereby also denying that the atoning work of Christ can be manifested progressively in history. People should

therefore consider carefully the economic, social, political, and ethical implications of their eschatological views. When they make eschatological pronouncements, they are inescapably also making economic, social, political and ethical pronouncements. Eschatology and ethics cannot be successfully separated.

44

POLLUTION, OWNERSHIP, AND RESPONSIBILITY

> *If a man shall cause a field or vineyard to be eaten, and shall put in his beast, and shall feed in another man's field; of the best of his own field, and of the best of his own vineyard, shall he make restitution. If fire break out, and catch in thorns, so that the stacks of corn, or the standing corn, or the field, be consumed therewith; he that kindled the fire shall surely make restitution.*
>
> EXODUS 22:5–6

The theocentric issue raised by this passage rests on the recognition of each person's legal obligations as a responsible steward over private property (hierarchy: point 2) in a world in which God is the absolute owner of the world (sovereignty: point 1). As part of His providential administration over the world, God establishes boundaries in life (boundaries: point 3). These boundaries are ultimately ethical: the boundaries between covenant-keepers and covenant-breakers. The existence of these ethical boundaries is reflected in every area of life. Man cannot think or act apart from boundaries of various kinds. These ethical boundaries are reinforced by legal boundaries that separate the use of property. Boundaries are therefore inescapably tied to the legal issue of personal responsibility before God and man. To enforce these boundaries, God imposes penalties for their violation: (point 4: sanctions). This structure of biblical authority is basic to the extension of the kingdom of God in history (point 5: inheritance).

This passage deals with fire. Fire is a form of pollution. In this case, it has a source. It has a victim. It spreads across legal boundaries. This boundary violation calls forth sanctions: restitution. This simple legal relationship is the biblical starting point for a discussion of pollution in general. This legal relationship has economic effects.

It provides the proper conceptual framework for an analysis of the economics of pollution.

A. God Allocates Property and Responsibility

God parcels out property to his subordinates. The very phrase, *parcels out*, reflects the noun, a parcel. God places specified units of land under the administration of specific individuals, families, and institutions. This *division of authority is an aspect of God's overall system of the* division of labor. Responsibility for the administration of specific property units can therefore be specified by law. *The allocation of legal responsibility matches the allocation of property*. God holds specific people responsible for their stewardship over specific pieces of property. This enables owners to evaluate their own performance as stewards, and it also allows the free market and God-ordained governmental authorities to evaluate owners' specific performance. The ultimate economic issues are these: (1) each person's stewardship over property in history and (2) God's judicial response in history and at the final judgment to their administration of His property (Matt. 25). The temporal institutional issues of ownership-stewardship are covenantally related to these ultimate issues.

1. Property Rights

These verses make plain at least three facts. First, the Bible affirms the moral and legal legitimacy of the private ownership of the means of production. Fields and cattle and crops are owned by private individuals. Second, private property rights (legal immunities from action by others) are to be defended by the civil government. The state can and must require those people whose activities injure their neighbor or their neighbor's property to make restitution payments to those injured. Third, owners are therefore responsible for their own actions and for the actions of their subordinates, including wandering beasts.[1]

This combination of (1) privately owned property, (2) personal liability, and (3) predictable court enforcement of private property rights is the foundation of capitalism. It surely was a major aspect of

1. Hammurabi's Code penalized a man who neglected to repair a dike on his property, which in turn broke and allowed his neighbor's property to be flooded: CH, paragraph 53. If he allowed water to flow through his canal and onto his neighbor's property, he was liable: CH, paragraph 55. *Ancient Near Eastern Texts Relating to the Old Testament*, ed. James B. Pritchard, 3rd ed. (Princeton, New Jersey: Princeton University Press, 1969), p. 168.

the West's long-term economic growth.[2] But, as I argue in this chapter, this property ownership arrangement is also important for both the reduction and the allocation of pollution.

2. The Wandering Domestic Animal

We begin with the case of the wandering animal. It wanders from its property and invades another man's corn field. It eats some of this corn. The owner of the beast owes the victimized neighbor the equivalent of whatever has been destroyed.[3] The owner of the beast must not short-change the victim; he pays from the best of his field. The legal principle is that the injured party is entitled to the replacement of his damaged goods by the best of the responsible party's possessions. What is the theocentric principle that this legal principle reflects? It is this: *God, in imposing an appropriate restitution payment from rebellious mankind, is entitled to the best that man has to offer*. This is why man was not allowed under the Old Covenant to bring to God's sacrificial altar any injured or blemished animal (Lev. 1:10). "But cursed be the deceiver, which hath in his flock a male, and voweth, and sacrificeth unto the Lord a corrupt thing" (Mal. 1:14a). When Ananias and Sapphira brought only part of their pledged money to the church, but claimed that they were bringing in all of it, God killed them (Acts 5:1–10).[4] They had violated a fundamental biblical principle. They became publicly cursed deceivers. "And great fear came upon all the church, and upon as many as heard these things" (Acts 5:11).

3. Restitution to God

This theocentric principle governing restitution to God points to the ultimate principle governing the atonement: *only a perfect offering for sin can placate the God of perfect wrath*. Anyone who attempts to bring a blemished sacrifice to the altar of God will be destroyed.

2. Nathan Rosenberg and L. E. Birdsell, Jr., *How the West Grew Rich: The Economic Transformation of the Industrial World* (New York: Basic Books, 1986), ch. 4.

3. Maimonides made this peculiar exception: "If an animal eats foodstuffs harmful to it, such as wheat, the owner is exempt because it has not benefited." Moses Maimonides, *The Book of Torts*, vol. 11 of *The Code of Maimonides*, 14 vols (New Haven, Connecticut: Yale University Press, [1180] 1954), I:III:3, p. 12. That the victim must suffer an economic loss just because his neighbor's animal did not profit biologically from its invasion of the former's property is a principle of justice that needs a great deal of explaining. Maimonides provided no further discussion; he just laid down this principle of Jewish law, and went on.

4. Gary North, *Sacrifice and Dominion: An Economic Commentary on Acts*, 2nd ed. (Dallas, Georgia: Point Five Press, [2000] 2012), ch. 4.

This, of course, is the underlying soteriological requirement that made necessary the incarnation, death, resurrection, and ascension of Jesus Christ. Only a perfect man, God's own Son, can serve as an acceptable sacrifice for sinful mankind (Heb. 2:14–18; 9:12–14). A sinful man will perish eternally if he attempts to short-change God by offering anything on judgment day in place of exclusive faith in the true mediator and high priest, Jesus Christ.

Initially, Exodus 22:5–6 may seem self-explanatory. Nevertheless, when we consider the passage in the light of the many intellectual and institutional problems related to the whole question of pollution and ecology, its application in society becomes an enormously complex judicial task. Without the legal guidelines established by the passage, we could not deal effectively with the pollution problem.

B. Pollution: Socialistic and Free Market

Contrary to many of the twentieth-century critiques of both capitalism and pollution, socialist commonwealths did not produce reasonable, cost-effective, workable solutions to the pollution problem.[5] Think of Poland's Katowice region, in which the sulphuric and nitric acids released into the atmosphere by coal and steel plants so corroded the railway tracks that the trains were not allowed to go over 25 miles per hour.[6] Think of the workers in Cracow's steel plant, where in 1980, 80% of those leaving the plant received disability payments, and 7.5% died while still employed.[7] The problem is inherent in the state's ownership of the means of production; the means of production necessarily must include the workers. The state owns their labor. Ultimately, the radical socialist and Communist states assert actual ownership of the workers, disposing of them however the bureaucrats see fit. It is "common ownership"—bureaucratic ownership—which creates most of the economic incentives to pollute and exploit the environment, because leaders within the civil government's hierarchy become the unnoticed beneficiaries of the increased output of lower-cost industrial processes that produce the pollution. The plant managers meet their state-assigned output quotas less expensively (for their local plants) by transferring some of the costs of production to the public:

5. Fred Singleton (ed.), *Environmental Misuse in the Soviet Union* (New York: Praeger, 1976).

6. Lloyd Timberlake, "Poland–the most polluted country in the world?" *New Statesman* (22 October 1981), p. 248.

7. *Ibid*., p. 249.

smoke, noise, chemical wastes, etc. Politically acceptable solutions to widespread pollution have never been successfully implemented in socialist societies because it is the private ownership of the means of production that serves as a key element in any successful program of pollution control.[8]

At the same time, free market economists have not been able to produce theoretically acceptable solutions to the problem of pollution that do not rest heavily on the idea of the necessity of government intervention into market operations. The problem then becomes: *How much intervention is appropriate in any given case*? There is no theoretically acceptable answer to this problem. In fact, because of the very nature of modern economic theory, there never will be a theoretically acceptable solution that is consistent with contemporary economics. I have added Appendix H to prove this assertion. It deals with the crucial, neglected, and somewhat technical problem: *determining social cost*. I have added it in order to demonstrate that conventional humanist economic theory is epistemologically incapable of dealing with the problem of pollution—or any problem of applied economics, for that matter—because there is no self-consistent way for the economist to go from modern economics' methodological individualism to collective decision-making in terms of the presuppositions of modern economic theory. The economists almost never discuss this embarrassing fact, although the more sophisticated members of the economics profession have been aware of it since at least 1938,[9] but it is nonetheless a fact.

Thus, both collectivism and free enterprise face a growing problem, the problem of minimizing the negative effects of pollution without simultaneously destroying the benefits of economic growth. Neither variety of secular economic theory has a scientific answer to this problem. This is why Christian economics is needed. This is why we must begin our economic analysis with Exodus 22:5–6.

C. Capturing Economics for Christ

The theoretical and practical problems associated with the pollution question are numerous. The problems are ethical, technical, theoretical, and ultimately philosophical. Economists do not like to admit

8. See Appendix I: "Pollution in the Soviet Union."

9. The debate in *The Economic Journal* between Lionel Robbins and Roy Harrod. I discuss this in *Sovereignty and Dominion: An Economic Commentary on Genesis* (Dallas, Georgia: Point Five Press, [1982] 2012), ch. 5:C:1.

that all problems in applied economic theory have inherent and inescapable ethical and philosophical aspects, so they tend to ignore or even suppress these aspects of applied economics when discussing them in their scholarly journals. This is why modern economics to a great extent is fraudulent—a mental contrivance to conceal fundamental ethical issues, a series of rarified mental exercises devised for agnostics by agnostics. But the agnostics maintain monopoly control over the professional journals because they control the funds, the academic institutions, and the certification of younger scholars. This epistemological agnosticism must change if economics as a discipline is to be saved, but only self-consciously Christian scholars can redeem it.

How should Christians go about redeeming any academic discipline? By beginning with the whole Bible as academically and professionally authoritative. Christians must begin to tackle those intellectual problems for which the humanists have no consistent answers. In the case of economics, Christians must follow the lead set by Cornelius Van Til in philosophy. Van Til did not ask: "Is Christian philosophy valid?" He started with the premise that there is no valid philosophy except Christian philosophy. That is what I have asserted with regard to Christian economics. Humanists have run out of internally consistent answers. In fact, they never had accurate answers that were not implicitly based on biblical presuppositions, and the further away the economists get from the Bible, the fewer accurate answers they provide.

We can see this drift away from theoretically consistent answers by a study of a specific problem of applied economics, pollution. This chapter can serve as an introduction to the kinds of theoretical and practical problems that face professional economists, and that also face Christians who are intent upon redeeming economics for Christ. It is a scaled-down study, not overly technical (except for Appendix H, on social costs). It is only an introduction. Nevertheless, the topic's complexity may scare off Christian laymen. Because of this complexity, I need to list in advance some of the basic themes in this lengthy chapter. The reader should be prepared to think through some fundamental ethical issues. This is the price of the first phase of Christian reconstruction.

How to assess true costs and benefits

Overusing "free" resources

Private property vs. disputes

Fire as pollution

Damage and restitution

Restitution in advance (discounts)

Allowing prior pollution to continue

Voluntary contracts that allow pollution

Pollution and the varying costs of knowledge

Risks that can be insured against

Undiscovered risk and legal liability

Retroactive penalties vs. innovation

Externalities: forcing you to pay me

How to allocate pollution regionally

A pollution auction

Wastes and stewardship: Who pays?

Pollution as trespassing

The problem of moving fluids: liability

Automobile emissions: noise and exhaust

Fire codes: Are they biblical?

Organizing injured victims

Exchanging risks voluntarily

Increased wealth and pollution complaints

Localism and pollution control

Subsidizing the politically skilled

The anti-dominion impulse

Claims of future generations

Incentives and sanctions

Pollution and responsibility

State officers as surrogates

Information and pollution: Who knew?

Incentives and sanctions to stop

Zero pollution: a messianic quest

D. The "Tragedy of the Commons"

A fundamental economic problem in any system of common ownership is the problem of assessing true costs and benefits.

1. Common Land

Historically, one of the most familiar of these systems of common ownership has been commonly held land. From the Middle Ages through at least the late seventeenth century, these property units were known as "the commons," and the term still persists in some regions of the United States, referring usually to city parks.

Where the community allows citizens to place their grazing animals on the commons, a whole series of difficulties emerges. The economic benefits accrue directly to the man who places his animal on the "free" land, but the costs are borne by everyone in the community who would like to use the property for any other purpose. In Puritan New England in the seventeenth century, roaming animals uprooted plants and overgrazed pastures. Townspeople cut down trees in the night for firewood or fencing.[10] Similar problems have plagued the commons in every culture. This is the direct result of a system of ownership in which economic gains go to individual users and costs, while borne by non-users.

Such a system inevitably produces economic waste and personal disputes over the proper use of the common property. Those who benefit directly from their personal use of the commons have few direct economic incentives to conserve the commons' scarce economic resources, for these resources are obtained at nearly zero cost to the private users. The cost of running one additional animal on the commons is minutely felt by any single taxpayer-owner, but he receives the full benefits immediately. Individual benefits are high; per capita

10. Gary North, "The Puritan Experiment in Common Ownership," *The Freeman* (April 1974); reprinted in *Puritan Economic Experiments* (Tyler, Texas: Institute for Christian Economics, 1988), ch. 1.

costs are low. There is an economic incentive to overgraze the commons, for economic restraints are minimal (e.g., taking your animals to the pasture), while the benefits are direct. This creates a system of "positive economic feedback" rather than "negative feedback." It leads to a situation described by some scholars as "the tragedy of the commons."[11] It involves such phenomena as overgrazing, soil exhaustion, and pollution. J. H. Dales correctly observed: "The economic effect of making common property available for use on a no-rule basis, so that it may be freely used by anyone for any purpose at any time, is crystal clear. Common property will be over-used relative to both private property and to public property that is subject to charges for its use or to rules about its use; and if the unrestricted common property resource is depletable, over-use will in time lead to its depletion and therefore to the destruction of the property."[12]

2. Private Ownership

The private ownership of property drastically reduces these problems. Private costs are more readily, accurately, and inexpensively assessed than public or social costs, precisely because private owners directly face the effects of their own economic decisions. The cost of adding another animal to the land is borne directly by the man who expects to profit from the decision, if the owner of the animal is also the owner of the land.[13] When the expected private costs of adding one more animal to the land exceed expected future benefits, owners will stop adding new animals. Private costs and private benefits tend to balance over the long run. The better the knowledge that owners have about costs and benefits, the more rapidly these costs and ben-

11. Garrett Hardin, "The Tragedy of the Commons," *Science* (13 Dec. 1968). Hardin called for greater government intervention rather than an expansion of private property rights. A refutation is C. R. Batten's "The Tragedy of the Commons," *The Freeman* (Oct. 1970). See also Robert J. Smith, "Resolving the Tragedy of the Commons by Creating Private Property Rights in Wildlife," *Cato Journal*, I (Fall 1981), pp. 439–68, and "Comment" by Walter N. Thurman, pp. 469–71.

12. J. H. Dales, *Pollution, Property, and Prices: An Essay in Policy-Making and Economics* (Toronto: University of Toronto Press, 1968), p. 63.

13. In the case of land which is rented or leased, the renter may attempt to pass some of these costs to the owner. He may allow his animals to overgraze, or he may allow the soil to be depleted or damaged in other ways. Profit-seeking owners need to consider these costs when they draw up the terms of the lease. The original lease contract may impose penalties on renters who damage the property, or it may include incentives so that he will care for it. These economic-legal problems plagued Irish tenant farming during the centuries of absentee English ownership: Richard A. Posner, *Economic Analysis of Law* (Boston: Little, Brown, 1986), pp. 63–65.

efits will be balanced. Scarce economic resources are thereby better conserved in a legal system that affirms and enforces private ownership of the means of production, i.e., the free market system.

Nevertheless, men are continually tempted to pass on their costs of operation to their neighbors, while retaining personally all the benefits of production. In private affairs, this quite properly is called theft. One man may sneak his animals into another man's field. The other man is harmed economically—robbed of a portion of his land's productivity. The injured party has an immediate economic incentive to put a stop to his neighbor's practice of transferring production costs to him. His incentive as an injured private owner to stop the practice is far greater than it would be in a system of common ownership, where the injury is spread over the entire population of so-called owners. (Do we really own common property? If a man cannot disown a piece of property, it is difficult to see how he can be said to own it.[14] At best, the costs of "disownership" are high; they involve political mobilization, not simply a private offer to sell.)

The desire to reduce costs is strongly felt on both sides of the fence that separates privately owned properties. In fact, the very existence of the fence testifies to a man's desire to keep outsiders from transferring their costs to him. Of course, a fence also testifies to people's desire to avoid having their "benefits" wander off, especially if they might cause damage to another person's property, assuming restitution is the law of the land. As the American poet Robert Frost put it in his poem *Mending Wall*, good fences make good neighbors. What we need is a system of law that encourages people to mend their own fences. We need to do better than Talmudic Judaism, which simply forbade Jews to breed cattle, sheep, and goats anywhere near towns or settlements. These animals could be legally bred only in desert areas.[15]

3. Fences Reduce Conflicts

The Bible affirms that those who violate fences or property lines must make full restitution to the economically injured neighbor. The

14. "The corollary of the right of ownership is the right of disownership. So if I cannot sell a thing, it is evident that I do not really own it." F. A. Harper, *Liberty: A Path to Its Recovery* (Irvington-on-Hudson, New York: Foundation for Economic Education, 1949), p. 106.

15. Aaron Levine, *Free Enterprise and Jewish Law: Aspects of Jewish Business Ethics* (New York: Ktav Publishing House, Yeshiva University, 1980), p. 68. He cited the Talmudic book, *Baba Kamma*, 79b, 80a. He also cited numerous rabbinic sources: Maimonides, Karo, etc. (p. 194, note 42).

assessment of harm is easier to make than under common ownership. "His cows ate this row of corn in my cornfield." The owner of the damage-producing animals is responsible. Responsibility and ownership are directly linked under a system of private property rights. Under a system of private ownership, property lines are in effect cost-cutting devices, for they serve as cost-assessing devices. Without clearly defined property rights, and therefore without clearly defined responsibilities, the rights of "property"—God's living creatures and a created environment under man's dominion (Gen. 9:1–17)[16]—will be sacrificed.

Carefully defined property rights also help to reduce social conflicts. Dales wrote:

> Unrestricted common property rights are bound to lead to all sorts of social, political, and economic friction, especially as population pressure increases, because, in the nature of the case, individuals have no legal rights with respect to the property when its government owner follows a policy of "anything goes." Notice, too, that such a policy, though apparently neutral as between conflicting interests, in fact always favours one party against the other. Technologically, swimmers cannot harm the polluters, but the polluters can harm the swimmers; when property rights are undefined those who wish to use the property in ways that deteriorate it will inevitably triumph every time over those who wish to use it in ways that do not deteriorate it.[17]

Common ownership of large bodies of water, when coupled with an opportunity to pass on private costs of polluted production, increases the extent of water pollution. This is a bad system for the swimmers of this world.

In questions of pollution and environmental quality, there can be no neutrality. There are always winners and losers, although net winners may suffer some losses (air polluters breathe, too), and net losers may gain some benefits (asthmatics may earn high incomes by working for firms that sell raw materials to local polluting factories). It is the task of biblical exegesis to establish the ethical and legal foundations that enable civil judges to do the following: (1) identify the winners and the losers; (2) adjudicate cases properly in the sight of God; and (3) determine what is fair compensation to the losers from any unauthorized winners. One thing is certain: we cannot hope to attain a zero-pollution environment. All life is a form of pollution.

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16. North, *Sovereignty and Dominion*, ch. 17.
17. Dales, *Pollution*, p. 67.

E. Fire and Pollution

Each owner is also responsible for whatever actions that his animate or inanimate objects do that injure others. A fire that a man kindles on his land must be kept restrained to his property. If the fire spreads to his neighbor's field, he is fully accountable for all the damages. Men therefore have an incentive to take greater care when using potentially dangerous tools or techniques.

The problem of pollution should be subsumed under the general principle of responsibility for fire. A fire is a physical cause of physical damage. From the case-law example in Exodus 22:5, it is clear that a fire that a man starts is his responsibility. He cannot legally transfer risks to his neighbor without his neighbor's consent.

The Bible is not talking here about some shared project in which both men expect to profit, such as burning fields to get rid of weeds or unwanted grass. In such a mutually shared project, the case-law example of the man who rents his work animal to a neighbor, but who stays with the animal the whole time, is applicable. The neighbor is not required to pay anything beyond the hiring fee to the owner (Ex. 22:14–15).[18] If the animal is hurt or killed, the neighbor owes nothing. (If the two men start a fire that spreads to a third party's property and damages it, English common law holds both of them responsible, though not necessarily in equal economic portions, because the victim can collect more money from one than another[19]—what we might call "deeper pockets jurisprudence." Such a legal tradition makes joint activities between rich men and poor men less likely; the rich person, if he is aware of the law, knows that he will be required by the court to pay the lion's share of any joint restitution, simply because he can pay it more easily.)

There is no doubt that the fire-starter is responsible for all subsequent fires that his original fire starts. Sparks from a fire can spread anywhere. A fire beginning on one man's farm can spread to thousands of acres. Fire is therefore essentially unpredictable. Its effects on specific people living nearby cannot be known with precision. I adopt the principle of uncertainty, meaning the unpredictability of the specific, individual consequences of any fire, as the governing principle of my discussion of restitution for damage-producing fires, as well as laws relating to the regulation of fire hazards.

What about pollution? Specifically, what about the uncertainty

18. Chapter 47.

19. Posner, *Economic Analysis of Law*, pp. 171–73.

aspect of pollution? A Christian economist should argue that a man must not pollute his neighbor's property without making restitution to him for any new damaging effects. If existing pollution is discovered to be more harmful medically or ecologically than had been understood before, the polluter should be required to reimburse those who are subsequently affected adversely by the pollutant after the information concerning the danger is made public by the state or becomes known within the polluting industry. (I will consider the legal and economic problems associated with retroactive responsibility in a subsection of this chapter, F:3: "Undiscovered Risk.")

1. Land Discounts: Restitution in Advance

But what if the complaining neighbor had purchased his land knowing all about present nuisance effects (as distinguished from subsequently discovered nuisance effects) of the pollution process that was going on next door to his property? Does he now have the legal right to sue his neighbor, who is doing exactly what he was doing before the contiguous property was sold? After all, the buyer bought the property at a discount as a result of the depressing effect on local land prices produced by the pollution. There is no doubt that there is an inverse relationship between the damage caused by pollution and land rents (and therefore the market price of land): the greater the pollution, the lower the rents.[20] The purchase price of land—the capitalization of expected net returns over time—reveals this inverse relationship.

Economic analysis informs us about the costs and benefits of biblical morality, and biblical law tells us who should bear these costs and receive these benefits. As potential buyers, we look at the discount in the purchase price of the land next door to a polluting production process, and we can conclude that this discount serves as an advance payment of restitution to the buyer. It is an advance payment for specified, known kinds of expected future "spillovers." The nuisance effects of these spillovers from the property next door are implicitly agreed to by the buyer when he receives his discount from the seller. Any subsequent attempt by the buyer to demand financial compensation from the polluter under such circumstances is simply a demand for a statist, compulsory redistribution of private property. So is any legislation that would force the polluter to reduce pollu-

20. T. D. Crocker, "Externalities, Property Rights, and Transaction Costs: An Empirical Study," *Journal of Law and Economics*, XIV (Oct. 1971), p. 452.

tion, unless new information regarding the dangers of the pollution is discovered. It would be a demand for restitution in addition to the discount already received by the buyer when he bought the property.

Murray Rothbard used the concept of the "homesteading principle" to defend the legal right of a polluter to continue to pollute. By developing a previously unused piece of land, the polluter has created an easement right to whatever polluting processes he adopts, just so long as these processes do no physical harm to those people who owned nearby property when he bought or discovered his land. He "owns the right" to emit noise or other forms of pollution, assuming his original neighbors were unaffected. In the case of pollution, he called this a pollution easement.[21] This is comparable to the right to start a fire on property you own.

The Christian economist could also argue that a protesting "pro-environmentalist" who demands that the civil government put a stop to his neighbor's pollution is seeking to achieve a less polluted lifestyle at his neighbor's expense, despite the fact that he bought the property at a discount because of the pollution. Would the protester be willing to pass on to the polluter any increase in the value of his property that results from the reduction of pollution, to help defray the costs of reducing the pollution? Or would he be willing to return an amount of money equal to the increased property value to the original seller, who had to take a discount in order to sell the property? If not, why not? Economically speaking, he is demanding double compensation: initially from the seller, who took a discount, and then from the polluter. Is this fair, even in the name of ecology?

2. Sewers and Property Value

Perhaps we can better understand the economic issues that are involved here by examining the economics involved in the installation of water or sewer lines in a region of town that had previously been dependent on wells and septic tanks. The municipal government could make an offer to local residents who are about to see their property values rise as a result of the new municipal service. The city says: "If you want to hook up to the new lines, you must pay a high hook-up fee to the municipal water company—a fee closer to the full value of the resulting increase in your property's value." In short, the

21. Murray N. Rothbard, "Law, Property Rights, and Air Pollution," *Cato Journal*, II (Spring 1982), p. 77; reprinted in Rothbard, *The Logic of Action: Two* (Cheltenham, UK: Edward Elgar. (1997), pp. 146–47.

resident who receives the increase in the value of his land must pay for this appreciated value. This is the way that new sewer projects should be financed, not by assessing all taxpayers in the community. Those who benefit directly and immediately should bear the full costs of the project, or at the minimum, should be required to pay the equivalent of the immediate increase in the value of the property, perhaps in the form of higher assessments per month for a fixed period of time. If sewers were financed this way, there would probably be less political resistance from local taxpayers to local growth.[22]

What is the economic principle involved? Simple: one person should not be compelled by the state to finance the exclusive increase in value of another person's property. The taxpayer whose property is unaffected by the increased benefits associated with a new water or sewer line should not suffer economic losses (higher property taxes or water bills) because he has to pay for another resident's economic windfall (waterfall?). The beneficiary should pay for the benefit.

So it is with pollution. The beneficiary of the improved environment—a benefit extracted through compulsion by the civil government—should pay for this improvement. He should compensate the neighbor for the costs borne by the neighbor in reducing the existing level of pollution.

3. Private Contracts

Why should the civil government get involved in the dispute at all? Why shouldn't the benefit-seeker approach the polluter directly and offer him direct compensation? The beneficiary knows approximately what it would be worth to him to escape from the pollutant. The polluter knows approximately what the value of being able to pollute means to him. If the benefit-seeker's price is high enough, he can persuade the polluter to sign a contract guaranteeing to reduce or eliminate the polluting activity. In effect, the benefit-seeker pays to the polluter part or all of the discount he initially received from the seller.

The polluter may reject the offer. Under the assumptions of this hypothetical example, this is his legal privilege. But it costs him to reject the offer. He forfeits the economic benefit offered by the pollution-avoider. His cost of continuing to pollute has just risen appreciably. He can no longer pollute at zero cost. He has an economic incentive to stop polluting the environment.

22. Gary North, "Public Goods and Fear of Foreigners," *The Freeman* (March 1974).

I am speaking here of pollution that was known in advance, and for which the buyer of the adjacent property received a discount. I am not speaking of new pollution or an older pollution process which, through improved scientific knowledge, is now understood to be more of a physical hazard than had been understood before.

Summary

By assigning to individuals the economic and legal responsibilities of ownership, God imposes on individuals the burden of assessing the costs and benefits of their actions. There is no escape from this economic responsibility. "No decision" is still a decision. If an asset is squandered, the owner loses.

The chief failure of what is commonly referred to as collective ownership is that no individual can be sure that his assessment of the costs and benefits of a particular use of any asset is the same assessment that those whom he represents economically would make. The tendency is for individuals who are legally empowered to make these representative decisions to decide in terms of what is best for them as individuals. There is also a tendency for the decision-maker to make mistakes, because he cannot know the minds and desires of the community as a whole.

The common property tends to be wasted unless restraints on its use are imposed by the civil government. The "positive feedback" signals of high profits for the users are not offset by equally constraining "negative feedback" signals. Users of a scarce economic resource benefit highly as immediate users, yet they bear few costs as diluted-responsibility collective owners. Thus, in order to "save the property from exploitation," the civil government steps in and regulates users. This leads to political conflicts.

The biblical solution to this problem is to establish clear ownership rights (legal immunities) for property. The individual assesses costs and benefits in terms of his scale of values. He represents the consumer as an economic agent only because he has exclusive use of the property as legal agent. He produces profits or losses with these assets in terms of his abilities as an economic steward. The market tells him whether he is an effective agent of the competing consumers.

The legal system simultaneously assigns responsibility for the administration of these privately owned assets to the legal owners. It becomes the owners' legal responsibility to avoid physically damaging their neighbors through the use of their privately held property.

The specific biblical classification of fire damage governs pollution in general.

There is no doubt that living close to a source of pollution increases the risk of suffering economic losses. The market reveals this by forcing sellers of polluted or nearly polluted land to offer discounts to buyers. This leads us to conclude that if a person has bought a piece of property at a discount because of its proximity to a known source of pollution, the buyer has no legal claim against the polluter unless the latter adds to the level of pollution or else new dangers regarding the pollution itself are subsequently discovered.

The civil government should not tax one group in order to reward exclusively some other group. Thus, individuals should pay to gain access to a cleaner environment if they are the only (or primary) beneficiaries of the cleaner environment. Each person should assess the costs and benefits of living in a cleaner environment. Nevertheless, when someone begins to damage his neighbor's physical environment, the victim should be able by law to put a stop to the polluter's activity or else be compensated by the polluter.

F. Pollution and the Costs of Knowledge

If pollution is really equivalent to fire's damaging effects, and because we see that the Bible makes all fire-starters legally liable for damages, then is this economic analysis of pollution and damages—the concept of the purchase price discount as a form of restitution payment—ethically biblical? Shouldn't all damage-inflicting pollution be banned, whether or not the buyer next door knew in advance about it? After all, he may also have known that the man next door started fires regularly, but he would also know in a biblical commonwealth that the fire-starter is personally liable for all future damages that his fire might cause. Why should the polluter be allowed to go on with his polluting without paying damages, yet the fire-starter be required to pay for all damages, irrespective of the neighbor's discount? Are the two cases ethically the same or different?

1. The Economics of Uncertainty

They are the same cases in principle, but they are different in application. To explain the differences in application, I must return to the issue of uncertainty. Specific effects of noise and smoke are known by the general public. They are nuisance effects. They are effects that buyers can estimate, at least to the extent that discounts are offered

by sellers to buyers for agreeing to live next door to smoke and noise pollution. In contrast to the known effects of a familiar form of pollution, the specific effects of any given fire are uncertain. They can be negligible or catastrophic. A fire may affect people distant from the point of origin. Thus, the fire-starter is warned: be extremely careful. Biblical law warns all fire-starters: "You are legally responsible for all damages caused by your actions. We all know how dangerous fires are; do not attempt to transfer the side-effects to a neighbor." Under biblical law, society is partially protected from essentially unpredictable catastrophes, because those who light the fires are restrained by the threat of full financial responsibility for damages that the fires inflict.

The difference between "traditional" polluters—smoke, noise, smells—and fire-starters is primarily a difference in men's knowledge of each action's future effects. The specific local effects of a familiar form of pollution are approximately known in advance to those who choose to live near pollution. The specific effects of specific fires caused by local fire-starters are not well known to nearby residents. Whether specific sparks from a specific fire will be harmless or will ignite this or that field, or this or that neighborhood, cannot be known in advance. I must focus my exegetical attention on these specific effects.

2. Insurable Risk

The existence of fire insurance does not invalidate this analysis of "the economics of specific effects." While it is often possible for a person to buy fire insurance, the reason why fire insurance is available at all is because companies insure many different regions, thereby taking advantage of "the law of large numbers." They can insure specific properties economically only because fires have known effects in the aggregate. If there were no known statistical pattern to fires in general, insurers would not insure specific properties against fire damage.

This is not to say that the following arrangement should be prohibited by law. A person who wishes to begin a business that is known to be dangerous approaches others who could be affected. "I'll make you a deal," he says. "I will pay for all increases in your insurance coverage if you let me begin this business in the neighborhood." If they agree, and if the insurance companies agree to write the policies, then he has met his obligations. He has made himself economically

responsible for subsequent damages. Instead of paying for damages after the fact, he has paid in advance by providing the added insurance premiums necessary to buy the insurance.

What if some resident says "no"? The prospective producer of danger can then offer to buy him out by buying his property. If the offer is accepted, the prospective danger-producer can then either keep the property or sell it to someone who is willing to live with the risk, if the discount on the land's selling price is sufficiently large. But if the original owner refuses to sell, and if he also refuses to accept the offer regarding insurance premiums, then the first man should not be allowed to force out the original owner. If he begins the dangerous production process, the existing property owner can legitimately sue for damages. The court may require a money payment from the danger-producer to the potential victim. If it does, then many other people may sue for damages. This threat will inhibit the dangerous production. The court need not necessarily prohibit the activity altogether.

Judges must do the best they can in estimating the costs and benefits to the community, including the perceived value to citizens everywhere of the preservation of private property rights by the state. They cannot estimate perfectly, for they cannot know the psychic costs and benefits involved in the minds of the conflicting parties. But they can make general, "unscientific" estimations, given the image of God in all men, and given the created environment in which all men live. This is an important application of biblical revelation to economics: if there is no universal humanity (no universal human nature) and no Creator who serves as the basis for man's image, and no creation governed by the Creator in terms of His value and His laws, then it is impossible for the judges legitimately to have confidence in their estimation of social costs, social benefits, private costs, and private benefits. Without our knowledge of objective economic value provided by God's plan and His image in man, objective economic value becomes epistemologically impossible.[23] Judges would then be blind in a sea of exclusively subjective economic values in which it is philosophically impossible for men to make interpersonal comparisons of subjective utility.[24]

23. North, *Sovereignty and Dominion*, ch. 5.
24. See Appendix H: "The Epistemological Problem of Social Cost."

3. Undiscovered Risk

If the case of the polluter and the fire-starter is essentially the same case ethically, then we have another legitimate question to deal with. Should the polluter be held fully responsible for any yet-to-be-discovered effects of his pollution? Should judges require polluters to make retroactive penalty payments to victims if dangerous effects of the pollution are discovered? After all, a man who starts a fire cannot escape responsibility for the damage his fire inflicts on others. Why should the polluter escape? Again, the ethical principle is the same, but the application is different. Again, the difference in application relates to the question of knowledge.

Men know about fire's general potential for creating damage. It is a dangerous tool. In contrast, a particular form of pollution may not be known to be dangerous generally, although it is known to be a nuisance specifically. The nuisance factor is what provides the victim with his discount when he buys the neighboring property—a discount appropriate to the known side-effects of the polluting process. The limited but known effects of the polluting activity can be dealt with by the victims. They receive compensation in advance in the form of discounted land purchase prices for relatively predictable damages.

The problem of uncertainty concerning pollution has increased since the end of World War II. The development of the petrochemical industry has created new problems associated with toxic wastes. The physiological effects of today's forms of pollution may not be well known. Uncertainty increases, making some forms of pollution more like the example of uncontrolled sparks than like smoke, whose effects are not lethal. The modern legal system has struggled with the implications of the new technology:

> However, modern chemicals are suspected of causing physical injuries, such as cancer, and certain emotional dysfunctions having etiologies that are little understood by science or medicine. One of the most significant characteristics of the development of these types of diseases is their latency, the time between exposure and expression of the disease. For example, a few types of cancer have a latency period of 20 to 30 years while some mutagenic diseases may take a generation or more to become evident. Moreover, chemicals suspected of causing such diseases often function at low concentrations, e.g., parts per billion, or perhaps a single molecule. In addition, pollution injuries, unlike common traumatic injuries, may be inflicted on many persons located far from the pollution source.
>
> Particularly baffling is their unpredictability. If a heavy beam falls upon a worker, the injury will be much the same regardless of who is struck.

> Exposure to identical concentrations of a given pollutant, however, may produce reactions varying from no observable ailment to a life-threatening emergency.
>
> These characteristics create unprecedented uncertainty, thereby challenging the ability of the judicial system to perform its traditional role of balancing the availability of compensation for individual injury against the social benefits of the injury-causing agent.[25]

4. Retroactive Payments vs. Innovation

The question of a retroactive payment in the future for late-appearing medical or ecological harm that was produced by the pollutant before the pollutant was regarded as dangerous is a controversial topic. Polluting when the specific effects are not presently regarded as dangerous seems to be a case of accidental harm without personal liability. Men are not omniscient. They should not be held personally liable for harm that results from seemingly harmless activities or activities that were known to be nuisance-producing, but for which the victims had received compensation, either directly (e.g., restitution) or indirectly (e.g., a iscount on land purchase price).

This is an aspect of the judicial problem of negligence. Traditional Jewish law recognized that where no foreseeability was possible, individuals should not be held legally liable for damages that result from their actions. "Cases where the defendant is entirely exempt from liability because he was in no way negligent are of two kinds: (1) the plaintiff himself was negligent because he should have foreseen the possibility of damage, i.e., where the defendant acted in the usual way and the plaintiff acted in an unusual way and the damage was therefore unforeseeable; (2) neither party could have foreseen the possibility of damage and therefore neither was negligent."[26] These conditions are theoretical; seldom are real-life situations able to be defined this clearly. In the older common law tradition, if the courts determine that both parties are negligent, the victim must pay for his own losses—the doctrine of contributory negligence.[27] The point is

25. Robert K. Best and James I. Collins, "Legal Issues in Pollution-Engendered Torts," *Cato Journal*, II (Spring 1982), pp. 104–5. See also Peter Huber, *Liability: The Legal Revolution and Its Consequences* (New York: Basic Books, 1988), pp. 67–70, 112–14.

26. Shalom Albeck, "TORTS. The Principle Categories of Torts," *The Principles of Jewish Law*, edited by Menachem Elon (Jerusalem: Keter, 1975?), col. 321.

27. In recent years, a new doctrine has emerged: comparative negligence. It examines "relative fault" in accidents. It is a means of forcing some people or businesses to provide insurance for negligent accident victims. Posner, *Economic Analysis of Law*, pp. 156–57. See also Huber, *Liability*, pp. 78–79.

clear, however: a legal system must not be constructed that rests on the operating presupposition that people can be expected to possess perfect foreknowledge.

If civil law does hold innovators financially responsible for possessing knowledge before even specialists have it, then innovation will be inhibited. Developers of potentially dangerous production methods will be afraid to produce anything new. The more rigorously the law links long-run damage to a particular new technology, the more that any given innovation will be regarded by producers as potentially dangerous. The costs of testing all possible effects could conceivably wipe out most innovation. (By requiring perfect testing, and by enforcing this requirement perfectly, the civil government could wipe out all innovation perfectly.) At the very least, newer, more innovative but undercapitalized firms would be forced out of the market, which is one reason why large, bureaucratic, lawyer-filled, conventional, and heavily capitalized firms tend to favor government rules and regulations that make the introduction of a new technology expensive. If such legislation is passed, existing firms can then buy up innovative processes at prices lower than those that would otherwise have prevailed.

The costs (forfeited opportunities) borne by many members of society as a result of the innovation that is not introduced could easily be far greater than the damage inflicted by a mistake in the early stages of a production process. A classic example of just this sort of retarded technology is the American pharmaceutical industry, which is hemmed in by extremely expensive testing requirements—requirements that are designed more to protect the careers of the federal bureaucrats who are empowered by law to regulate the industry than designed to protect the public.[28]

Common law recognizes a category of activities called ultrahazardous. The legal principle of strict liability applies to them. Those who are involved with them are held fully responsible, no matter what. Such things as blasting with explosives are included, as well as the ownership of wild animals. But "ultrahazardous activity" is a vague concept. There is a tendency to affix the label to new activities. Posner argued that because we do not know much about their effects, the best way to prevent damage may be to take greater care. This

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28. Sam Peltzman, *Regulation of Pharmaceutical Innovation* (Washington, D.C.: American Enterprise Institute, 1974); Peltzman, "The Benefits and Costs of New Drug Regulation," in R. Landau (ed.), *Regulating New Drugs* (University of Chicago Center for Public Policy Study, 1973); Robert B. Helms (ed.), *Drug Development and Marketing* (Washington, D.C.: American Enterprise Institute, 1975).

means imposing the law of strict liability until society gains more knowledge about them. This is a means of accident control.[29] The proper biblical response to this state-enforced limitation of innovation is to allow contracting parties to waive their right to sue in case damage results. The case of a terminally ill patient who is willing to try an experimental drug is an obvious example. Needless to say, this is rarely allowed by the bureaucrats.

I began with the premise that men are not omniscient; therefore, knowledge is not a free good. A society generally should not make an increase of knowledge a retroactive liability on those who make a discovery and implement it. Retroactive compensation statutes would put too great a liability on polluters who discover a dangerous effect from the effluent that their company produces. The firm's officers would have too great an incentive to hide the results of their findings. It is better to encourage them to admit the existence of the problem and then remove the offending product or manufacturing process, or remove it geographically, in order to avoid any future judgments against them. Penalties could legitimately be imposed in cases where prudent research—"prudent" ultimately being defined retroactively by a jury—into the dangerous effects of a production process or a product was deliberately avoided by the producer. But from the standpoint of passing legislation in the United States, Article I, Section 9 of the United States Constitution prohibits ex post facto laws that declare some action illegal, and then retroactively impose damages on those who broke the law before it became a law—a wise, state-restraining provision of the Constitution.

Summary

Men are not omniscient; therefore, information must be paid for. Accurate information is even more expensive. Any approach to economics that does not honor this principle from start to finish will be filled with errors.[30]

Individual sparks from a fire are unpredictable in their effects. We can make guesses about the overall effects of a fire, but an area of uncertainty is inescapable. Thus, when we analyze pollution damage in terms of the damage produced by a fire, we must be careful analytically. There are differences of available knowledge in the two types of cases, and therefore different solutions to the respective threats.

29. Posner, *Economic Analysis of Law*, pp. 163–64.
30. Thomas Sowell, *Knowledge and Decisions* (New York: Basic Books, 1980).

Living next door to a fire-starter may be tolerable. Farmers start fires to burn grasses or timber, for example. We do not call for a complete banning of all open fires. We do make people responsible for damage produced by fires that they start. The greater the danger of fire, the more concerned nearby residents must be. Sometimes, the public bans fires altogether.

The same is true of pollution. Sometimes polluters are allowed to continue to pollute the environment, especially if they have been polluting it for a long time, and those nearby have purchased land at a discount. But with respect to newly discovered dangers, the polluter is warned: continue polluting, and you will be required to make restitution to victims. This is analogous to the warning to fire-starters if the wind shifts or increases. What was acceptable before may be unacceptable now.

Because no one can know everything, it is impossible to preserve life by eliminating every possible danger before taking any action. It would make human action impossible. We are not God; society must not expect people to perform as if they were God. Thus, there must always be limited legal liability in life. Nevertheless, for those actions that are known to be dangerous, people must be made legally responsible for their actions. This does not justify holding people fully responsible for actions made in terms of earlier knowledge. With greater knowledge comes greater responsibility (Luke 12:47–48).[31] If society tries to impose damages retroactively on actions that were taken yesterday based on yesterday's information, it would destroy the legal foundation of progress.

There can be no life without pollution. There can be no life without risk and uncertainty. We must not strive to build a zero-pollution, zero-risk world. What we must do is to restrain those who would impose added known risks in the lives of neighbors without the latter's permission. We find the legal rule that provides this restraint in Exodus 22:5–6.

G. Externalities

A man should not be prosecuted for polluting his own land, so long as the form of pollution does not have measurable, physical, and undesired effects on anyone else's life, health, or property. Because it is his own land, he has internalized the costs of pollution. (By "inter-

31. Gary North, *Treasure and Dominion: An Economic Commentary on Luke*, 2nd ed. (Dallas, Georgia: Point Five Press, [2000] 2012), ch. 28.

nalize," I do not mean simply a mental calculation; I mean that his property alone suffers from his actions.) He risks starting a fire on his own property, or he runs a herd of cattle on his own property. The man making the estimate of benefits is the same person who makes the estimate of costs; it is the same man who will reap what he sows.

Once he sells a section of his land, he no longer internalizes costs and benefits on the section that was sold. Another person is now involved: his neighbor. The first man must not be allowed to pass on to his neighbor the risks of living next door to a person who sets fire on his property. The fire-starter cannot legally transfer to his neighbor the generally known but highly unpredictable specific, individual production costs of fire. Economic analysis must begin with the Bible's assessment of personal responsibility for a man's actions. It must begin with the presupposition of the rights (legal immunities) of private property. These rights must be protected by civil law and custom.

The act of polluting someone else's environment is a crime in cases where either production costs or consumption costs[32] (including risks) that are known to a polluter but unknown to the victim are deliberately imposed on the victim. It is also a crime when someone begins a new and previously unpredicted polluting process without getting permission from future victims. In both cases, it is an attempt on the part of a beneficiary to "externalize" his costs of production or consumption by passing them along to others who do not profit directly from the production process or consumption activity. He lowers his costs by transferring a portion of these costs to innocent victims.

We can grasp the economics of pollution quite easily in the case of a manufacturer. Polluting allows him to retain a greater net income when he sells the goods, and it eventually allows him to increase output until his personally borne marginal costs equal his personally received marginal revenues, i.e., until he arrives at that level of output at which he loses money by producing one more item. But the total costs of production are higher than his personally borne marginal costs. These additional costs—costs above his personally borne costs—are involuntarily borne by the victims of his pollution. So, he continues to expand production above the level of output that he would have produced had he borne the full costs of his production

32. An example of a consumption cost that produces net losses for a neighbor would be the keeping of pets that bark or bite or otherwise disturb the neighbor.

process. If he is not required by law to share these marginal benefits with victims (restitution), and if he is also allowed to continue to pass on some of his production costs to them, then the law has created an incentive to overproduce this particular product.

There are many beneficiaries of this overproduction—overproduction that is subsidized by the victims of the pollution. Obviously, the owner of the firm benefits. Another group of beneficiaries is his customers, who can buy more goods at the same price, or the same number of goods at a lower price, than before the pollution process began. Third, there are employees of his company.

These groups of beneficiaries can become allies of the polluter in any political dispute concerning the continuation of the polluting practices. Edwin Dolan's comment is applicable.

> If he has to clean up he may pass part of the cost along to his customers in the form of a price increase, so his customers may testify on his behalf before the city council. If less of the product can be sold at the higher price, he may have to lay off some of his workers, and thus his employees may join the propollution faction. The addition of these allies does not alter the normative analysis of the situation, for if the act of pollution itself is a crime then these allies are nothing but partners in crime. The customers of the firm are in a position analytically identical to the recipient of stolen goods. The producer kept his price low only by forcing the residents adjacent to his establishment involuntarily to subsidize the cost of production, by permitting their lungs and noses to be used as industrial waste disposal units, substituting for the mechanical units which should have been installed at the plant. The customers no more deserve to benefit from this tactic than the owner himself.[33]

Dolan explicitly used normative economic analysis. He did not ignore ethics. To ignore ethics as a matter of methodological objectivity, as most humanistic free market economists claim that they must,[34] is to subsidize immorality. They are importing immorality into their "neutral" economic analysis, all in the name of scientific objectivity. There are always unrecognized and uncompensated victims of "neutral" economic analysis, at least in those cases when policy-makers take seriously an economist's suggestion (sometimes called "a conclusion of scientific economics").

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33. Edwin G. Dolan, *TANSTAAFL: The Economic Strategy for Environmental Crisis* (New York: Holt, Rinehart & Winston, 1971), pp. 42–43. TANSTAAFL, the book's cover tells us, stands for: "there ain't no such thing as a free lunch."

34. In fact, they sneak in their ethical views through the back door of applied economics—evaluating economic policies—and also through aggregation. See Appendix H.

H. Allocating Pollution

Dolan's analogies are both clever and graphic: consumers as "recipients of stolen goods," and nearby residents as "unpaid organic pollution-absorption devices." We need to pursue the analogy of the consumer as a receiver of stolen goods.

1. Shifting Costs

If a buyer of a domestically produced consumer good is enabled to make the purchase at a lower price than would have been possible, had the producer not been a polluter, then he has benefitted at the expense of the residents who have "absorbed" the pollution. The customer is a participant in the pollution process, even if he is unaware of the reason why he has been offered an opportunity to buy a product at a low price. The customer has transformed his private costs into social costs, for he in effect "hires" the polluter as his production agent when he makes the purchase. He provides the seller with money, which in turn encourages the producer to continue producing the product.

Should the customer be held legally responsible and economically responsible? No. He must assume that the producer is violating no laws in anyone's community. He cannot investigate every instance of lower-than-normal prices. He must act in terms of what is presented before him—product and price—and not become a full-time, one-man investigative agency. He assumes that the local civil government in the producer's region is serving as the agent of any injured local victims of pollution. The state should not attempt to impose on consumers all the producers' costs of knowledge in every economic transaction.

If the civil government in the producer's community steps in and requires the producer to install pollution-control equipment, and if the producer then discovers that he is in a position to pass these costs along to the buyer, at least temporarily, the buyer may begin to shop for a cheaper substitute. In this sense, the pollution-control equipment is essentially a tax. Contrary to popular opinion, taxes cannot be shifted forward to customers, at least not without uncertainty, precisely because customers may begin shopping around for cheaper, untaxed goods.[35] What if some "foreign" producer—in a for-

35. Rothbard stressed this. "It is generally considered that any tax on production or sales increases the cost of production and therefore is passed on as an increase in price to the consumer. Prices, however, are never determined by costs of production, but rather the reverse is true. The price of a good is determined by its total stock in

eign nation, or a "foreign" state or province across the nation, or in a "foreign" city across the state—is in a position to get the authorities in his region to allow the production of a comparable product at a more competitive price, by using the same polluting methods that the authorities in the first community banned? The foreign producer is allowed to pollute—to externalize production costs without getting permission from the victims.

2. Voting for Pollution

What if a majority of the "victims"—local townspeople—want jobs more than they want clean air or water? What if they agree, implicitly, with the decision of their civil authorities to allow the pollution? In other words, what if most residents in a different community are willing to receive income in the form of wages rather than in the form of a clean environment? The polluting process will then be transferred to the new region where this form of pollution is not so great a concern. The free market allocates pollution through competition.[36] The manufacturer in the first region, where voters prefer a cleaner environ-

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existence and the demand schedule for it on the market. But the demand schedule is not affected at all by the tax. The selling price is set by any firm at the maximum net revenue point, and any higher price, given the demand schedule, will simply decrease net revenue. A tax, therefore, *cannot* be passed on to the consumer. It is true that a tax *can* be shifted forward, in a sense, if the tax causes the supply of the good to decrease, and therefore the price to rise on the market. This can hardly be called shifting *per se*, however, for shifting implies that the tax is passed on with little or no trouble to the producer." Rothbard, *Power and Market: Government and the Economy*, 4th ed. (Auburn, Alabama: Mises Institute, [1970] 2006), pp. 110–11.

36. There is a problem here with majority rule. What if one person in the community objects to the polluting factory? If social policy by civil governments always had to attain unanimous consent in order to be implemented, there could be no civil government. The economic goals of a few people sometimes must be sacrificed for the sake of the majority. There are obligations and benefits for both the "one" (the society) and the "many" (individuals). The problem for humanistic economists is that if unanimous consent is not achieved within the electorate, then there is no way for economists to know whether a particular intervention by the state has maximized social welfare: John Burton, Epilogue, in Steven N. S. Cheung, *The Myth of Social Cost* (San Francisco: Cato Institute, [1978] 1980), pp. 62–63. The Bible gives us guidelines for establishing the necessary balance between the two. In the case of the anti-pollutionists in a community, they can sell their property to others who want to take advantage of a better "environment for jobs." Higher pay scales will tend to offset declines in property values that result from pollution. If a property owner believes that his losses are too great, he can sue the polluting company. Local legislation should not make such law suits impossible; it should only reflect a community's consent concerning the *approximate* level of pollution which a particular facility is permitted to emit. If one man's property is damaged excessively (wind patterns, etc.), then he should be allowed by law to take his claim before a jury of his peers.

ment to higher monetary income for local firms and higher income for those servicing those firms, will lose his share of the market to the producer in the second region.

Is the buyer of legalized higher pollution goods still "a receiver of stolen goods," economically speaking? (At no time is the consumer morally or legally guilty of receiving "stolen" goods. It is only a question of formal economic analysis—the economist's attempt to show who wins, who loses, and why, in terms of economic theory.) No, he is not guilty. Why not? Because a majority of voters in the manufacturer's community really are not deeply worried about the particular form of pollution involved in the specific manufacturing process, possibly because local air currents or water flows disperse the pollution effectively. The voters have announced, in principle: "Go ahead and buy our local manufacturer's lower-priced goods, for we are willing to accept the costs that his manufacturing process imposes on us as 'pollution absorbers.'"

The consumer cannot be held accountable, economically speaking, because he cannot know the local opinions of the townspeople. He has to assume that the goods are being produced lawfully. If residents are willing to put up with the pollution for the sake of the local economy, then in effect they are being compensated by the polluter. The higher wages or other economic benefits accruing to local residents as a result of the employment opportunities offered by the polluting company are, economically speaking, the equivalent of restitution. Victims are being compensated for their suffering. Therefore, the goods are no longer "stolen."

3. The Pollution Auction

Most people in the economically developed nations live in urban areas. These urban centers are noted for their smog-filled air, the noise of trucks rumbling down highways, traffic jams, noisy power lawn mowers, and other "spillover" effects. Yet people in the United States refused to move back to small towns until the 1970s, and even then, the move out of the major cities amounted to little more than a trickle. Few people in Western nations are moving to the small town or farming community. For that matter, few people in any nation are moving to small towns; the phenomenon of urbanization is international. A nation's major economic opportunities are generally concentrated in cities. Yet there is little doubt that industrial pollution is nonexistent in most of these rural areas.

What is a legitimate conclusion regarding this fact of urbanized life? Simple: most people do prefer clean air and quiet streets, but they want them at very low prices. The demonstrated preference of the vast majority of Western citizens is for the city, with all its pollution. The polluted environment of the city is preferable to the differently polluted environment of the rural countryside. It may have something to do with rural insects, dust, or pollen; it may have more to do with loneliness or the hard work of subduing a rural environment. It almost certainly has a lot to do with comparative opportunities for monetary income. But it is a fact that most people have chosen to live in the industrially or mechanically polluted environments that a vocal minority decries publicly. Most people prefer an urban type of pollution to a rural type, given today's array of prices. Change the array of prices, and people may well move out of the city.[37]

In effect, people in various regions are involved in a giant auction—a pollution auction. Some people bid high. They announce, in effect, "We'll put up with a lot of smog for the sake of high incomes to match our sunny climate" (Southern California). Or they say, "We'll put up with noxious fumes from wood pulp mills in order to live in the green outdoors" (western Oregon). People in particular regions are more concerned about one form of pollution than another. This preference may be strictly aesthetic, or it may be due to special problems posed by the fluid in question. For example, a region's stagnant air but free-flowing, aerated streams may make liquid effluents more acceptable than smoke effluents. In another region, the reverse may be the case. What we find, then, is that voters in regions "buy" the quantity and kind of pollution they most prefer.

There will always be some pollution where there is life. Francis Schaeffer wrote a book called *Pollution and the Death of Man*. I much prefer the title, *Pollution and the Life of Man*. Pollution is inescapable. We are all polluters. We are all exhalers and excreters. What we need are legal and institutional arrangements that allow us as individuals to make our own decisions concerning what kind of pollution we are willing to put up with, and at what price.

This is the legal and institutional framework that is produced by biblical law and free market economics. Each region selects a par-

37. If people presently dwelling in American cities should become convinced that a terrorist group plans to attack cities with biological weapons next year, the array of prices would shift. The same would also be true if people became convinced that some deadly plague is specifically urban and expected to become an epidemic.

ticular form of pollution in the quantity it can tolerate at prices it is willing to pay. Each community is forced to give up particular forms of a clean environment in exchange for other benefits. There are no free lunches in life; there are also no pollution-free environments. Scarcity is inescapable (Gen. 3:17–19).[38] At zero price, there is always more demand for clean air and pure water than there is available supply.

4. The Mobility of Capital

The free market's mobility of capital allows communities to make the choice among various mixtures of pollution and economic benefits, but local regulations also force polluters to participate in this choice. Production can shift, industry by industry, to those regions of the globe where the particular form of pollution involved is most acceptable. The free movement of capital combines with competitive markets for consumer goods to make it possible for regions to make effective "bids" for the "pollution-income package" they prefer. At the same time, local legislation that restricts certain kinds of locally less desirable pollutants forces plant managers to come to grips with the true costs of production in that region. They can then decide if it would pay to shut down the factory and relocate elsewhere. And even if they simply shut down the factory and go out of business, another firm using the same production methods can always go to a community where the firm's polluting is acceptable at some price. So, customers, by responding or failing to respond to offers by sellers, force a redistribution of pollution from one region to another. But to do this, consumers in effect work with local civil governments.

Anthony Koo remarked that two countries with identical economic resources and technologies could engage profitably in trade if the two populations had different environmental preferences. He also warned against the danger of globally enforced, uniform environmental standards. People in underdeveloped nations will be suspicious about the imposition of Western standards. "The movement could be construed as an attempt to impose pollution controls that will prevent them from taking full advantage of comparative cost. . . ."[39]

38. North, *Sovereignty and Dominion*, ch. 11.

39. Cited in James C. Hite, *et al., The Economics of Environmental Quality* (Washington, D. C.: American Enterprise Institute for Public Policy Research, 1972), p. 35.

Summary

Pollution is a side effect of production (including life). What is a side effect? It is an effect that the affected people do not like. Effects are effects; the "side" aspect of an effect is an assessment made by observers.

In any production process, there are costs to be borne and benefits to be reaped. The economic goal of a biblical legal order is to create an institutional order that will allocate costs and benefits fairly. What is fair? The Bible is clear: a man reaps what he sows. Those who seek the benefits must bear the costs. But men are advantage-seekers. If they can pass on costs of operations to others, their net return on their property increases. Thus, the legal order must see to it that costs are paid by those who can legally claim the benefits of any action. In short, costs ("side effects") must be allocated, just as benefits ("effects") must be.

There are inescapable costs involved in achieving the benefits of reduced pollution. Production involves costs; therefore, the production of a cleaner environment produces costs. We speak of externalities, but there are two kinds of externalities in any production process: cursings (costs) and blessings (benefits). A person who is not an owner of a firm may suffer from its pollution, but he may also make a living by selling goods or services to people employed by the polluting firm. Thus, for him to see the reduction of the costs (pollution), he may also find the reduction of the benefits (income). Non-owners who are affected will differ in their personal cost-benefit analysis regarding the effects of the local production process. Some of them will seek economic restitution or political allies in stopping the pollution; others will bear the costs and even organize politically to defeat those who have organized a zero economic growth—clean air lobbying group.

The allocation of pollution is in part political and in part economic. The free market requires a legal order to protect it (benefit). One of the costs of obtaining this legal order is the risk that the owners of a particular production process will lose wealth when the production process is either hampered by regulations or else is legally shut down by those who have become "pollution absorbers" in the community.

The civil government is one institutional means through which the competing individual assessments of costs ("side effects") and benefits ("effects") are weighed and acted upon. The decision may

be made in terms of "one man–one vote," or it may be made representatively by a council or a judge; it may be made representatively by a jury. Civil governments also compete against each other, bidding for or against polluting industries.

The other institutional means of assessing costs and benefits is the free market itself: "high bid wins." Customers vote with their money (productivity). The interaction of these competing assessments results allocates pollution. The owner of the production facility then responds to the highest bid: market plus civil government. He may close the factory, or install pollution-control devices, or pay the fines, but it is the owner who is ultimately responsible. This is why ownership is ultimately a social function, an aspect of representative government. The owner is inescapably a steward.

I. Identifying the Polluter

We cannot live in a pollution-free world. We pollute the environment simply by being alive. Even when we die, we "pollute" as we rot; but one species' pollution is another species' life-support system. The question is: How can we see to it that pollution is distributed according to the needs of individuals, social units, and the non-human environment? How can we best adhere to our responsibilities under the ecological covenant?[40]

Some forms of industrial pollution may be illegitimate. Permanent or near-permanent toxic wastes, including radioactive waste and waste from burning coal, may place such a burden on future generations and future environments that toxic waste-producing processes should be abandoned until cost-effective disposal methods are developed. The problem is, the public has been misled about the risks. Waste from radioactive materials is a legitimate problem. The major creator of radioactive wastes in the United States has been the United States government, which was involved in the production of nuclear weaponry. Both the production and (of course) the ultimate use of these weapons are sources of such waste. Second, the risks of peacetime radiation are not overwhelmingly great, compared to coal wastes. The waste-disposal problem is a real one; there are real economic costs involved in solving this problem. Nevertheless, scientific evidence points to the ability of radioactive waste-producers to reduce risks to a minimum, especially cancer risks. Even in the much-

40. North, *Sovereignty and Dominion*, ch. 17.

feared and highly improbable case of a core meltdown of a nuclear reactor, the risks are not that great, especially compared to the very real risks of dying from pollution from coal-fired plants.[41]

The public is not aware of the huge waste-storage problems associated with coal-fired electricity. Coal ash is being disposed of in landfills. A 1,000 megawatt plant must dispose of 36,500 truckloads a year. A professor of electrical engineering offered this assessment:

> The tens of millions of tons of ash generated by U.S. coal-fired plants every year are dumped in landfills. . . . There are no provisions to prevent the poisons in coal ash being leeched out by rainwater (they are dumped close to the surface) and creeping into aquifers. . . . The radioactivity of the radium and thorium isotopes in coal ash exposes the public to [up to 50] times[42] the dose received from nuclear plants of equal capacity and would violate NRC [Nuclear Regulatory Commission] standards if the NRC were responsible for coal-fired plants, but it isn't. The radionuclides contained in coal ash are chemically active and soluble in water; yet the stuff is dumped close to the surface without strict control and without even any monitoring.[43]

The best way to achieve increased safety from toxic waste is for the state to establish safety criteria for dumping sites and then to require producers to bear the full costs of waste disposal.[44] This includes the cost of dismantling nuclear power plants after their economic life is over.[45] The state has increasingly begun to require this,

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41. For a carefully argued presentation of the evidence in this regard, see Bernard L. Cohen, "Radiation Pollution and Cancer: Comparative Risks and Proof," *Cato Journal*, II (Spring 1982).

42. In the 1976 book, the author used the figure "at least 180 times," but has revised this downward as of 1988: letter to me.

43. Petr Beckmann, *The Health Hazards of NOT Going Nuclear* (Boulder, Colorado: The Golem Press, 1976), p. 107. Beckman was a professor of electrical engineering at the University of Colorado.

44. Cohen wrote: "One important aspect of the high-level waste disposal question is the quantities involved: The waste generated by one large nuclear power plant in one year is about six cubic yards. This waste is 2 million times smaller by weight and billions of times smaller by volume than wastes from a coal-burning plant. The electricity generated by a nuclear plant in a year sells for more than $200 million, so if only one percent of the sales price were diverted to waste disposal, $2 million might be spent to bury this waste. Obviously, some very elaborate protective measures can be afforded." Cohen, *op. cit.*, p. 266.

45. The important economic and political argument against the commercial use of nuclear power is that the state, because of the military applications of nuclear power, and because of its declared monopoly over the supply of nuclear materials, has an implicit monopoly over electricity generated by nuclear power. This centralizes the production of electricity. The free market solution should be a *decentralized* distribution system. Free market power generation should be as localized and independent of the

but two problems have appeared. First, organized crime has moved into the "midnight waste disposal business." Highly toxic wastes are being dumped at below-market prices by criminals who pick up the liquid wastes in tank trucks and deposit these effluents in public sewers or on private property.[46] The civil government is almost helpless in the face of this activity. It is an evasion of the problem to blame the government for imposing compulsory waste-disposal costs on private firms, as one libertarian economist does.[47] If the government has imposed too many regulations, then economists need to show what an appropriate program would be. But anarchist economists reject this responsibility. They simply announce: "There is no government solution to pollution or to the common-pool problem because government is the problem."[48]

The second problem arises when the state and its licensed agencies are the prime polluters. This is especially true in the case of water pollution. Municipalities have saved money by reducing expenditures on sewage treatment facilities. How can the state compel itself to be responsible to God, men, and the non-human environment? Jerome Milliman, a specialist in the field of the economics of water distribution and environmentalism, commented on this problem.

> In 1972 Congress established the Federal Water Pollution Control Act in which the Environmental Protection Agency was given responsibility to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." Two national goals of "swimmable and fishable" in 1983 and "zero-discharge" in 1985 were set forth. . . .
>
> As of 1980, EPA reported that the industrial dischargers had a compliance rate of 80 percent. By contrast, municipal dischargers have been slow to comply despite being eligible for construction grants, with a compliance rate of 40 percent with the 1977 requirements. In February 1980, EPA estimated that 63 percent of major municipal treatment facilities were not yet in compliance with the original July 1977 deadline. By the

state as economically feasible, such as power produced by cost-effective solar energy, with rooftop solar panels. The sooner consumers can "unplug" from municipal power companies—or at least can sell back excess power their panels produce during the day—the better it will be for the cause of freedom.

46. Michael Brown, "Toxic Waste: Organized Crime Moves In," *Reader's Digest* (July 1984). The problem of toxic wastes from commercial manufacturing processes appeared only after the Second World War, with the development of the petrochemical industry.

47. "Already existing regulations and laws make it too costly for honest firms to dispose legally of these wastes." Gerald P. O'Driscoll, Jr., "Pollution, Libertarianism, and the Law," *Cato Journal*, II (Spring 1982), p. 51.

48. *Ibid.*, p. 50.

> end of 1979, EPA had obligated $24.4 billion in construction grant appropriations (75 percent of construction costs) to municipalities for sewage treatment plants. Construction had begun on 6,623 projects but only 1,552 were in operation. EPA inspections of operating municipal sewage plants reveal that less than one half perform satisfactorily because of operation and maintenance problems. Apparently, EPA is in a poor bargaining position with reluctant municipalities to require compliance because of lack of effective sanctions.[49]

Milliman also pointed to another problem—a problem that no one so far has been able to deal with successfully, either theoretically or institutionally: non-point sources of water pollution. All our energy and effort has been lavished on the question of how to reduce point sources, such as manufacturing plants, municipal sewage treatment centers, and other "piped" effluents. But what about agriculture? What about topsoil runoff and livestock urea runoff? In the cities, what about storm water runoff? Over half of all pollutants coming from non-point sources were uncontrolled, as of the early 1980s, and over half of all pollutants entering surface waters came from non-point sources.[50] As he said, "In contrast to the limited progress that has been made in cleaning up point discharges, progress with non-point sources is almost negligible."[51]

Christians must insist that this world is God's, and men are His stewards. When certain forms of pollution are beyond our ability as creatures to deal with effectively, we should abandon the production processes that leave the uncontrollable wastes. But this also means that we have a responsibility to develop economically and institutionally workable allocation systems to dispose of the wastes that we can control. A combination of private ownership, private responsibility, public sanctions, and the free flow of capital makes possible an efficient spreading of pollution into those communities that can deal with them most effectively. There is a division of labor in the world. There are different environments in different regions of the earth. We need a cost-effective allocation of pollutants in order to protect the earth's entire environment. More specifically, we need a program of market incentives and state sanctions to distribute pollution in such a manner that concentrated and dangerous pollutants are rendered harmless, either by safety packaging or by dilution through geographical dispersion. Without the free market, it is unlikely that the

49. Jerome W. Milliman, "Can Water Pollution Policy Be Efficient?" *ibid.*, pp. 165–66.
50. *Ibid.*, pp. 166, 190.
51. *Ibid.*, p. 190.

earth's total pollution will be allocated efficiently. Civil government alone cannot do it.

J. Moving Fluids

Dolan linked the crime of pollution with the crime of trespassing.[52] Pollution is therefore an invasion of the rights of private ownership. This explains why it is legitimate to bring in the civil government to reduce "pollution invasions" in a neighborhood. By placing pollution within a moral framework, his study avoids a sense of unreality, something that too many other economists have not avoided.

1. Private Property

What do we mean by "private property"? Wrote legal theorist, economist, and later Federal judge Richard Posner: "A property right, in both law and economics, is a right to exclude everyone else from the use of some scarce resource."[53] Professor Steven Cheung agreed, but added two important qualifying aspects of this legal right to exclude: a property right is the right to exclude others from using an asset, the right to benefit from an asset's productivity, and the right to transfer either or both of these two rights to others.[54] This is an ideal definition, as he admitted. In practice, exclusivity and transferability are matters of degree.

It should be clear why questions of pollution arise more readily in cases where private property rights have not been (or cannot be) established. The great area of pollution is the area of moving fluids, namely, air and water. Who owns the air? Who owns the oceans? Who owns the river? Everyone? No one? Economically, it makes little difference which we conclude, everyone or no one. There is a tendency for men to waste resources under either assumption. As Dales said, "There is an old saying that 'everyone's property is no one's property,' the inference being that no one looks after it, that everyone overuses it, and that the property therefore deteriorates. History bears

52. Dolan, *TANSTAAFL*, p. 69.

53. Richard A. Posner, *The Economics of Justice* (Cambridge, Massachusetts: Harvard University Press, 1983), p. 70.

54. "A good or an asset is defined to be private property if, and only if, three distinct sets of rights are associated with its ownership. First, the exclusive right to *use* (or to decide how to use) the good may be viewed as the right to exclude other individuals from its use. Second is the exclusive right to receive *income* generated by the use of the good. Third, the full right to *transfer*, or freely 'alienate,' its ownership includes the right to enter into contracts and to choose their form." Steven N. S. Cheung, *The Myth of Social Cost*, p. 34.

out the truth of this saying in many sad ways. Property that is freely available to all is unowned except in a purely formal, constitutional sense, and lack of effective ownership is almost always the source of much mischief."[55] There is an economic incentive to convert private costs (smoke, heat, effluents, noise) into social costs—costs borne by others in society.

2. Automobile Emissions

The problem is especially acute when there are multiple and basically unidentifiable polluters. Very often those who pollute the environment also suffer from the pollution. For example, a man starts an automobile engine. He becomes a polluter of the air (exhaust emissions, noise). His car's contribution to the overall level of exhaust emissions pollution is infinitesimal—probably unmeasurable from five feet away, unless the car is old and smoking. Yet 13 million internal combustion-engine registered vehicles in a trapped-air basin like California's Los Angeles county region create pollution that is all too measurable: smog. If total air pollution in a particular region is to be reduced, then all the permanent polluters in that region—e.g., people whose automobiles are licensed locally, but not visitors from outside the region—must be restrained by civil law.

Economically speaking, the emissions-control device on a car is no different from the exhaust muffler, although the latter is more readily understood. Both devices raise the price of the car, reduce its engine's efficiency, and increase gasoline consumption. Both protect innocent bystanders: less noise, less bad air. Both protect the owner of the car: less noise, less bad air. The protection of the innocent bystander is the focus of biblical law, however. If the owner were the only person affected, the law would not be legitimate. He should be allowed to do what he wants with his own eardrums and lungs.

Neither of these emissions-control devices will be paid for entirely by the automobile manufacturers, for manufacturers are not the only ones involved in the pollution process. Pollution-control or noise-control devices are, economically speaking, a kind of sales tax that is paid by consumers, despite the fact that the "collection" of the sales tax is made by the auto companies when they sell the cars. Drivers are the local polluters; auto manufacturers are their accomplices. Drivers usually prefer to convert private costs (lower performance, the cost of the device) into social costs (noise and air pollution), especially if

55. Dales, *Pollution*, pp. 63–64.

they believe that other drivers are allowed to do the same thing. Car buyers are therefore required by law to pay for pollution-control devices when they purchase the cars. But, in most cases, pollution-control devices are not required for older model cars; the laws only apply to current production models and future models.

The automobile companies also lose, as the new car drivers' "accomplices," for they cannot automatically "pass along" the added costs of production to buyers. Some buyers may decide to keep driving older, "hotter" performance cars, especially if new car prices rise. This raises the question of who pays. If the public insists on buying new cars, and if all new cars must be fitted with the equipment, then the companies will more readily attempt to "pass on" the extra costs to the buyers. But this is always risky. If buyers have acceptable substitutes—mass transit, for example, or keeping older model cars—then the car manufacturers may not be able to pass on costs without losing buyers. Substitutes or not, total sales of cars could drop as a result of higher prices, and total revenues might fall. The auto manufacturers cannot be certain in advance. So, they tend to resist any new legislation that would raise their costs of production because of this uncertainty.

Managers do not want to risk the threat of the wrath of the legal owners of the automobile companies. Who are the legal owners of these firms? Those people who own shares of ownership. How can they retaliate against the senior managers? By selling their shares, thereby depressing the price of the shares and reducing the value of the capital owned by the senior managers. We know that a very important form of compensation to the senior managers of a firm is the appreciation of their shares of stock in the firm.[56] They do not want to risk seeing the price of the shares drop. Why would the share owners start selling? Because of the very real possibility that the company's total net revenues will drop in response to reduced sales of the now higher priced cars. Therefore, the costs of pollution-control devices cannot be passed on by the company to the customers at zero price (zero risk) to the company—its managers, workers, and share owners.

Mandatory pollution-control devices, biblically, are like spark-retarding devices: they protect other people's property. Where there are multiple polluters, only the civil government can effectively restrain a significant number of polluters, for all are bound under civil law. The civil government protects property owners

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56. Henry Manne [MANee], *Insider Trading and the Stock Market* (New York: Free Press, 1966), ch. 8.

Summary

There are always problems in identifying polluters, because all of life is a pollution process. The media have focused on nuclear power plants, but they have generally ignored waste materials produced by coal-fired plants. The politicians studiously ignore the pollution produced by the state's own production facilities. Also, there are nonpoint sources of pollution that cannot be regulated effectively by law. There are limits to bureaucratic regulation, in other words. If self-government fails, then civil government will fail, too.

The world is under a curse. This curse cannot be escaped, only modified. The land brings forth thorns (Gen. 3:18)—"side effects," in other words, meaning unwanted effects. Pollution can be reduced through self-discipline, better scientific knowledge, market incentives, and the threat of punishment. It cannot be eliminated, however, because man's knowledge is limited, and so is his power over the many known effects of human action. The best that we can hope to accomplish is to identify major sources of known dangerous pollution, to study the effects of legislation in reducing the production of such pollution, and then persuade voters to impose workable sanctions against polluters. When criminals are convicted for illegally dumping known toxic wastes into public sewers, and then sold into lifetime servitude to pay the fines, we will see less toxic waste dumped into sewers. There will always be some, however.

All government begins with self-government. Self-government must become more important in regulating pollution, for it is not possible to identify all polluters, and it is also not possible to eliminate every known form of pollution. When polluters know that they will suffer economic sanctions and public ostracism when convicted, they will modify their behavior. They will not modify economically profitable behavior until the public is willing to impose civil sanctions, however. We can see this in the case of abortion. If physicians are willing to get rich by aborting babies, we should not be surprised to find that ordinary businessmen are willing to dump effluents into rivers, even dangerous effluents. If the voting public and its judges cannot distinguish between the effects of abortion (legal) and the effects of the agricultural use of DDT (illegal), then we should not expect to see the spread of self-restraint by industrial polluters.

K. Legitimate State Coercion

In the case of a single violator or a few potential violators, there are two reasons justifying the coercive intervention of the civil government.

1. Fire

To use the biblical example of fire, a man who permits a fire to get out of control may see an entire town burned to the ground. There is no way, economically, that he can make full restitution. In fact, it would be almost impossibly expensive to estimate the value of the destroyed physical property, let alone the loss of life, or the psychological anguish of the victims. Therefore, in high-risk situations, the civil government can legitimately establish minimum fire prevention standards. (Analogously, the civil government can also legitimately establish medical quarantines to protect public health: Lev. 13, 14.)[57]

Carl Bridenbaugh, in his study of urban life in seventeenth- and early eighteenth-century colonial America, discussed this problem in detail. "The specter of fire has ever haunted the town-dweller. This necessary servant may, amidst crowded town conditions, buildings of inflammable construction and the combustible materials of daily housekeeping and commerce, become his deadly enemy. Even in Europe the means of fighting fire were very crude in the seventeenth century, and only towards its close did the great cities, driven by a series of disasters, begin to evolve a system for combatting it."[58] Such measures infringed on personal freedom, and they increased costs on citizens, but they were necessary to help protect people from each other's mistakes—mistakes that the person responsible could not have paid for. In fact, it could easily be argued that the very inability of anyone to pay for them is in itself an incentive for people to take such risks. As Posner wrote, "An injurer may not have the resources to pay a very large damages judgment; and if not, his incentive to comply with the law will be reduced. . . ."[59]

2. Marginal Damages and Profit Centers

A second reason for allowing state coercion, though far less relevant, is that there may be cases of identifiable polluters who injure

57. Gary North, *Boundaries and Dominion: An Economic Commentary on Leviticus*, 2nd ed. (Dallas, Georgia: Point Five Press, [1994] 2012) ch. 9.

58. Carl Bridenbaugh, *Cities in the Wilderness: The First Century of Urban Life in America, 1625–1742* (New York: Capricorn, [1938] 1964), p. 55.

59. Posner, *Economic Analysis of Law*, p. 344.

many neighbors in a minor, though measurable, way. The costs of assembling all the injured parties—search costs, lawyer fees, delays in court hearings, injury assessments—into one or more legitimate complaining units may be too high for each member of the group to bear. Another way to gain restitution is the establishment of fines for polluters, including graduated fines as the levels of pollution increase. Least desirable, probably, is the outright abolition of the pollution-producing activity, although the costs of pollution abatement may in effect serve as outright prohibitions for marginally profitable firms.

The buyers of a particular product may save a few cents or many dollars because the costs of producing it are passed along, involuntarily, to residents living close to the plant, but this does not justify polluting, nor do considerations of the comparative wealth of buyers and injured parties. Coercion in the form of unforeseen and injurious pollution can legitimately be met by coercion from the civil government.

On the other hand, as we have seen earlier in this chapter, such pollution is not necessarily evil, if those who are injured have voluntarily assented to the injury. For example, consider the "company town," a town whose houses and public facilities have been built by a profit-seeking company that employs most of the town's residents. The firm's employees are given access to low-cost housing as part of their pay. They breathe the fumes of the factory, but they also gain the benefits of employment. A required anti-pollution program might make production costs skyrocket and force the closing of the factory. The benefits of employment at that location would then disappear. Workers may very well prefer noxious fumes to unemployment. Even in a normal community, where employees and non-employees live side by side and breathe the same foul air, a majority of voters may prefer the fumes to the economic effects of unemployment. This is especially true if the factory, or industry in general, is a primary employer in a particular region. Bad air may be preferable to most local residents, compared to the firm's bankruptcy. The poorer a community—the fewer economic and employment alternatives available to people—the more likely it is that people will choose bad air to unemployment.

If specific physiological dangers exist because of the fumes that are dumped into the atmosphere, or some water-carried effluent that is dumped into the public water supply system, then those affected must be warned. The problem of toxic wastes is a real one. When the victims do not have the technical expertise to discern a measurable,

statistically relevant danger to people's health, the civil government can legitimately require the polluter to warn them. But smoke is a familiar fact of life. So is smog. So is noise. If people choose to put up with these nuisances for the sake of employment or for a stronger local economy, then they should be allowed to do so.

3. Permitting Voluntary Exchange

Suppose, for example, that there is a very desirable piece of land overlooking a lake that is in the path of a proposed runway for jet planes. The land sells at a discount because of the expected noise. Potential buyers are warned in writing of the proposed airport. The buyer takes a risk. He buys his land less expensively, assuming that he will get used to the noise (which most people do). Perhaps the runway will never be built. Then he may find himself the owner of a far more valuable piece of property. Or perhaps the airport will be built, and the land appreciates anyway. (Empirical research indicates that almost without exception, land adjacent to proposed airports rises in value after the construction of the airport.)[60]

Question: Should the civil government forbid such a transaction if the seller has warned the buyer in writing concerning the risk? Why should the civil government be given such power? Perhaps a potential buyer cannot afford to buy a piece of land near a lake in any area not subject to a negative factor like noise. Wouldn't an outright prohibition on land sales be harmful to potential buyers and potential sellers? Wouldn't such legislation be discriminatory against poorer members of the community? Why should men be forbidden to trade off money against noise? On the other hand, should the airport be shut down by law because people who bought the land at a discount later decide that they want a noise-free environment, and then decide that a lawsuit is the way to get it? Is this not another case of theft, a coercive redistribution of wealth from the airport and airlines to the buyers of discounted land?

This example should not be construed to validate the case of a person who buys land at a high price and then is informed that the city council has voted to build the runway. Here is a case of a violation of his property rights. The Bible says that he must be compensated for any resulting loss. The beneficiaries of the council's action, i.e., the airlines that use the airport facility, should pay the victims either directly or indirectly, through taxes collected by the city and passed on

60. Cheung, *Myth of Social Cost*, p. 20.

to the victims. What should the compensation be? A payment equivalent to any drop in the market value of the property caused by the airport, plus moving costs, if owners decide to leave.

Something else should be considered. One reason why Western industrial nations have become so concerned with pollution is that they are wealthy.[61] As people's per capita income rises, they tend to worry less about where the next meal is coming from and more about their "quality of life," meaning their physical environment. The West does pollute the environment, but as people get richer, they tend to buy more services than goods. As national wealth increases, capital shifts to the service sector, and to high-technology, low-pollution production. Yet as the level of pollution may be dropping—or shifting from, say, horses to autos, from manure-filled streets and flies to smog and stinging eyes[62]—people's concern about pollution may be rising. As they become financially capable of reducing pollution levels, they demand action, even in the face of less dangerous forms of pollution than before. The smoke-filled skies of the great steel towns of the late-nineteenth century are sometimes smog-filled today. Are we so confident that we suffer from more pollution today? Women can safely hang clothes out to dry on a clothes line in Pittsburgh today; in the 1930s, the clothes—and even curtains in their homes—would be covered with soot in a few hours.[63] (Of course, most women use clothes driers today, which were not available to consumers in the 1930s.) The main reason why Pittsburgh's air is cleaner today is that so many steel mills have shut down due to foreign competition.

L. Regional Standards

When it comes to the problem of reducing the costs (increasing the efficiency) of assessing the effect of injuries, local civil governments

61. Lester Lave, "Health, Safety, and Environmental Regulations," in Joseph A. Pechman (ed.), *Setting National Priorities: Agenda for the 1980s* (Washington, D.C.: Brookings Institution, 1980), pp. 134–35.

62. Milwaukee, Wisconsin, in 1907 had a population of 350,000 people and a horse population of 12,500. The city had to dispose of 133 tons of horse manure daily. In 1908, when New York City's population was 4,777,000, it had 120,000 horses. Chicago in 1900 had 83,300 horses. This was in the early era of the streetcar and automobile. There were still 3.5 million horses in American cities and 17 million in the countryside. Joel A. Tarr, "Urban Pollution–Many Long Years Ago," *American Heritage*, XXII (October 1971).

63. Ted O. Thackery, "Pittsburgh: How One City Did It," in Marshall I. Goldman (ed.), *Ecology and Economics: Controlling Pollution in the 70s* (Englewood Cliffs, New Jersey: Prentice-Hall, 1972), pp. 199–202.

are best equipped to enforce pollution (cleanliness) standards. The larger the administrative or geographical unit, the more difficult it is to assess costs and benefits. Only when conflicts across political or jurisdictional boundaries are involved—county vs. county, state vs. state—should higher levels of civil government be called in to redress grievances. Local conditions, local standards of cleanliness, silence, or whatever, involve local conflicts. These are best settled by local governmental units.

If a national civil government imposes general pollution-control standards for clean air, local communities could be damaged economically. A community may have a polluting factory as its primary employment base. The factory is bankrupted by the newly applied national standards. Its owners, or rival producers of similar goods, may choose to move capital into a foreign nation whose political leaders are more anxious to create jobs than to avoid pollution. The pollution is simply shifted "off shore." This may be a good thing, overall; perhaps this particular sort of pollution will be less of a problem in some other geographical environment that is blessed with pollution-reducing wind patterns. Or a foreign nation may have a less dense population. The first question is: Who knows best? Is some political body or bureaucratic agency thousands of miles away from the affected areas sufficiently informed about local effects of such decisions?

A second relevant question is: Who pays? Rich voters in some regions of a country may be making political decisions that adversely affect poorer voters in different regions whenever national environmental standards are imposed. Are such national standards really that crucial to the survival of the environment? Can local geographical regions really destroy the ecology of the entire nation? What kind of proof can the defenders of national pollution-control standards present to defend their conclusion that such standards are exclusively a matter of national self-interest?

1. Subsidies to the Politically Skilled

One reason why we get national ecology or pollution-control standards is because of the costs of political mobilization. It is less expensive for special-interest groups to lobby a few hundred politicians in the nation's capital or to gain control over a Washington bureaucracy than it is to conduct a lobbying campaign in every regional legislature and local town council. The national civil government then preempts the regional units of civil government. This centralizes po-

litical power, which leads increasingly to a reduction of everyone's political freedom.

Why should residents of Los Angeles, California, or Denver, Colorado, who live in peculiar geographical environments (stagnant air currents, breeze-reducing surrounding mountains) impose their environmental standards on drivers in wide-open Texas or Wyoming? Why should they lobby for national auto pollution emission standards that will necessarily reduce the performance and increase the purchase price of all cars produced in the United States? They are demanding a subsidy: lower costs per unit for required pollution-control equipment (as a result of higher production of regulated cars), but increased costs for most other drivers whose communities are not in need of such devices. In this case, national pollution-control legislation is a politically acceptable wealth-redistribution scheme. If people in southern California want mandatory pollution-control devices for cars registered in their region, they can vote accordingly. Indeed, given the vast number of cars in this region, they must vote for emission standards if they are to improve the quality of the air they breathe. But they should not insist on a subsidy from car buyers and operators in other regions of the country.[64]

Why should those who worry about pollution be allowed to extract a subsidy from those who do not worry so much? Those who hate pollution are allowed to move to a less polluted region of the country. But they prefer to achieve their goal of living in a cleaner environment at the expense of local factory workers, whose jobs are "up in the air." How many factory workers are enthusiastic and dedicated supporters of the ecology movement, or were in its early days in the late 1960s? Aren't the movement's white-collar supporters better paid, more highly educated (at taxpayers' expense), and more mobile than the blue-collar working people whose jobs are at stake? The leather goods-selling "street people" with university degrees in sociology were more likely to be at the forefront of the ecology movement in 1968 than the average employee with General Motors. As one book pointed out, "Preliminary studies indicate in fact the opposite result from that expected by critics; that is, wealthy people tend to be lovers of [ecological] purity while the very poor are more interested in other problems."[65]

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64. To some extent, this principle is honored. Emissions-control standards have in the past been far more stringent for California than for other states in the U.S.

65. James C. Hite, *et al., Economics of Environmental Quality*, p. 34.

Some readers may think I am exaggerating. Not so. The Sierra Club is perhaps the most active lobbying organization for ecology in the world, along with Friends of the Earth. The group took out an advertisement in Advertising Age magazine, to attract advertisers for their magazine, Sierra. Why advertise in Sierra? Money! "Sierra readers have very good taste. Each month 81 percent serve domestic or imported wines, 27 percent serve bottled mineral water and 42 percent offer their guests imported beer."[66] In other words, they say of their readers, here are the educational and financial elite. Kevin Phillips, the political commentator, referred to environmentalists as "the wine and cheese belt."[67] The same theme was pursued brilliantly by William Tucker, in his 1982 book, *Progress and Privilege: America in the Age of Environmentalism*.[68] We should ask ourselves: To what extent is the concern about pollution a concern of the highly educated, higher-income intellectuals who have more skills in media manipulation and political manipulation than those who are not equally skilled, or who do not trust in salvation by political action?

Economist Thomas Sowell, who grew up in rural North Carolina and the Harlem "ghetto" of New York City in the depression and war years,[69] has identified the problem: the majority poor have too much money in the aggregate for the minority rich to compete against them successfully in a confined geographical region. The poor have more money. "There are infinitely more of them, and real estate dealers and developers would rather get $10 million from 10,000 people than get $1 million from one millionaire."[70] You will not see economic analysis like this in Sierra magazine:

> In the natural course of economic events, the non-rich would end up taking more and more land and shore away from the rich. Spectacular homes with spectacular views would be replaced by mundane apartment buildings with only moderately pleasant vistas. A doctor or movie mogul who can now walk the beach in front of his house in splendid isolation would be replaced by whole families of ordinary grubby mortals seeking a respite from the asphalt and an occasional view of the sunset.
>
> The climax of the story is when the affluent heroes are rescued by the

66. "Briefing," I(Nov. 8, 1982).
67. *Idem*.
68. Garden City, New York: Anchor Press/Doubleday, 1982.
69. Thomas Sowell, *Black Education: Myths and Tragedies* (New York: David McKay, 1972).
70. Thomas Sowell, *Pink and Brown People and Other Controversial Essays* (Stanford, California: Hoover Institution Press, 1981), p. 104. This essay appeared originally in the *Los Angeles Herald Examiner* (March 23, 1979): "Those Phony Environmentalists."

> government. In the old days, this used to be the cavalry, but nowadays it is more likely to be the zoning board or the coastal commission. They decree that the land cannot be used in ways that would make it accessible to the many, but only in ways accessible to the few. Legal phrasing is of course more elaborate andindirect than this, but that is what it all boils down to. This is called "preserving the environment" (applause) from those who would "misuse" it (boos).[71]

2. The Anti-Dominion Impulse

James Jordan was correct: biblical law is essentially antiaristocratic in the field of economics. An aristocracy of birth finds it difficult to retain its position at the top of the economic hierarchy in a free market society, which biblical law produces when it is enforced. The main antiaristocratic feature of biblical economics is the familistic aspect of capital. The reason for the anti-aristocratic provisions is dominion.

> If language is the first stage and prerequisite of dominion, property is the second. Adam was given the garden to beautify and protect (Gen. 2:15). He was to name it, get power over it, and creatively remold it. The eighth commandment protects private property, as do other provisions in the law of God (cf. esp. Lev. 25:13; and see I Ki. 21). Every man is to have his own garden. His marriage and his garden (work) are the major axes around which the ellipse of the temporal life is drawn. In pagan aristocratic societies, few men have gardens, and many men are slaves. Moreover, such aristocrats often exercise only minimal dominion, preferring to war or entertain themselves.
>
> Under the influence of Christian concepts of familistic property, the free market has acted to break up such large aristocratic holdings. The industrious poor eventually buy out the lazy rich, and anyone with thrift can eventually obtain his own garden. Dominion is multiplied.[72]

Public concern, meaning media headlines, for both the "population explosion" and the "ecology crisis" hit overnight, around 1967. As Marshall Goldman commented in 1967, "Today's news media devote almost as much attention to air and water pollution as to the problems of poverty. Virtually overnight pollution seems to have become one of America's major issues."[73] The rapid rise and fall of both issues as "media events" indicate that a deeply felt concern over these issues

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71. *Idem*.

72. James B. Jordan, *The Law of the Covenant: An Exposition of Exodus 21–23* (Tyler, Texas: Institute for Christian Economics, 1984), p. 133.

73. Marshall I. Goldman, "Pollution: The Mess Around Us," in Goldman (ed.), *Ecology and Economics, op. cit.*, p. 3. This book was first published in 1967 under the title, *Controlling Pollution: The Economics of a Cleaner America*.

in the minds of large numbers of voters was never present. Can we be sure that much of the motivation behind the once loudly proclaimed "concern for the environment" was not really a hatred of free enterprise, a hatred of economic growth as such?[74] Is a major underlying (and unstated) intellectual impulse behind the ecology movement an antidominion, anti-progress, anti-Christian Eastern mysticism, or a "back to nature" ideology that hates modern industrialism.[75]

It is difficult to take seriously anyone who writes, as the leading anti-growth economist, E. J. Mishan, wrote in a purportedly scholarly work: "The private automobile is, surely, one of the greatest, if not the greatest, disasters that ever befell the human race. For sheer irresistible destructive power, no other creation of man—save, perhaps the airliner—can compete with it.... One could go on, for the extent of its destructive powers is awesome to contemplate. Criminal success, especially of robbery and violence, has come to depend heavily on the fast get-away car."[76] (The get-away car? He must have been watching too many late-night gangster movies on television. Besides, the police have cars, too.) He should write a book called *The Sinister Ambulance*.

Mishan's radical elitism is clear enough in his discussion of the terrible effects of jet planes. They have allowed hordes of middle-class people to travel to the former pleasure spots of the rich: "...the airliner has conspired with the automobile to create a tourist explosion that, within a few years, has irrevocably destroyed the once-famed beauty spots of the Mediterranean coastline."[77] In the name of "the good life" and "the quality of life," the supposedly democratic and equalitarian academic scribblers are proclaiming the wonders of a world in which the middle class and the poor will not have the economic opportunity to "dirty up the environments" of the rich. "No growth" means less competition from the "unwashed masses" for those who have already arrived at the top.

Are there objective scientific standards of pollution? Yes. Are the physiological, ecological and economic effects of these pollutants

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74. See, for example, two books by Prof. Ezra J. Mishan, *The Costs of Economic Growth* (New York: Praeger, 1967) and *The Economic Growth Debate: An Assessment* (London: George Allen & Unwin, 1977).

75. Ayn Rand argued that the ecology movement is intensely anti-progress: "The Anti-Industrial Revolution," in her book, *The New Left: The Anti-Industrial Revolution* (New York: Signet, 1971), ch. 8. A similar thesis is presented by John Maddox, the editor of the British scientific journal, *Nature*, in his book, *The Doomsday Syndrome* (New York: McGraw-Hill, 1972).

76. Mishan, *Economic Growth Debate*, pp. 122–23.

77. *Ibid.*, p. 123.

universally agreed upon by scientists and other professionals? Seldom. Can economists assess the costs and benefits of pollutionor anything else-scientifically? No. As Dales wrote,

> The important question is how much "better quality environment" we would be willing to buy at different "prices" in terms of higher taxes and higher costs of goods, and most of us are not sure about this. As was suggested in the last chapter, the only way to answer the question may be to have the politicians start charging us for better quality air and water and then keep "upping the ante" until we say "Enough! No more!" The trouble is that when we call a halt about half of us will think that we are already spending too much to improve the environment, and about half of us will want to spend more; therefore very few of us will be very happy with the outcome.[78]

A perfect environment will not come from political pressure.

Few people are aware that the whole debate over carcinogens (cancer-producing substances) in the environment has been conducted with virtually no evidence. In her 1984 study of 15,000 scientific papers and books, Edith Efron reported that the scientific community has identified very few clear threats to human health in the modern environment. The public discussions of carcinogens in the environment had been conducted primarily by special-interest groups, political propagandists, social scientists, and a handful of scientists, often those employed by government regulatory agencies whose survival is dependent on continuing public funding. As she said, "the government has systematically fed the public the views of one faction in the academic world while the views of others have been largely withheld."[79] She correctly pinpointed the underlying problem: a commitment to a particular view of man and nature by modern scientists. Rachel Carson, whose apocalyptic book on the environment, *Silent Spring* (1962), launched the modern political ecology movement, operated in terms of a view that man is an invader in nature. Efron was correct: ". . . the apocalyptic approach to cancer rests, fundamentally, on the 'axiom' of a largely benevolent nature—on a vision of a largely noncarcinogenic Garden of Eden now defiled by the sins of pride and greed."[80] This deeply religious perspective has produced faith in a political solution: ". . . the 'axiom' of nature's minimal role in cancer

78. Dales, *Pollution*, pp. 71–72.

79. Edith Efron, *The Apocalyptics: Cancer and the Big Lie* (New York: Simon & Schuster, 1984), p. 12.

80. *Ibid*., p. 127.

causation led to a political conception of the disease of cancer and to a political solution.... The underlying 'axiom' of nature's virtual noncarcinogenicity was tacitly accepted, and the little packet of ideas that followed from that 'axiom' soon became the conventional wisdom: 'Man,' not nature, was responsible for the evil....'man' meant the men who made and used chemicals.... 'man' meant industry.... cancer was fundamentally a political disease."[81] The scientific facts prove otherwise: man's natural environment is itself carcinogenic.[82]

What is the biblical perspective? The Bible teaches that man is cursed, and so is nature. Neither man nor nature is normative, ethically or biologically. Man sickens and dies because he is under a curse, but no one environmental source is the primary cause of man's condition. To assume that nature is not carcinogenic is an exercise in fantasy.

Summary

There are certain kinds of damage that can become so widespread that those who produce them endanger too many people. In the case of some form of pollution that is known to be so damaging that the producer could not possibly make restitution to those injured, the state possesses the lawful authority to prohibit or isolate the activity. The example of fire codes is representative. Similar codes for polluting processes can and should be worked out by experts who are hired by the government, with the politicians invoking the required regulations. The legal justification for outright prohibition must be the known inability of damage-producers to pay their victims, should a crisis take place. The more widespread the production process is, and the more widespread its spillover effects, the less likely that a single producer could afford to make restitution. Thus, the civil government restricts the process.

The civil government is the necessary agent for settling disputes that cannot be worked out voluntarily and peaceably. It is an agent of last resort, for it uses coercion, a very dangerous monopoly to be invoked by anyone. The public should be willing to permit people to settle disputes over pollution on a mutually profit-seeking basis. The most obvious example is to allow people to accept known environmental defects in order to gain discounts on land purchases.

The assessment of risks (costs) and rewards is a cultural phenome-

81. *Ibid.*, p. 128.
82. *Ibid.*, pp. 125–75.

non.[83] Cultural preferences are expressed locally. They are more identifiable and distinct. Thus, the regulation of pollution should be limited judicially. The judicial authority to which voters assign the tasks of regulation should be closely restricted to the geographical region in which that type of pollution is being produced. There will therefore be less distorting of the pollution allocation preferences of the people who are involuntarily affected by the particular pollutants.

A major reason why regional pollution preferences are ignored is that those who are politically skilled in imposing their views on politicians prefer to concentrate their efforts and resources at the national level. A region-by-region political fight is expensive and essentially open-ended; the results will not be clear cut, for many regional politicians will resist the arguments of the anti-pollution forces. It is cheaper for the anti-pollution lobby to risk losing nationally on any particular vote and then try again than it is to try to win each region separately.

Dominion involves costs and risks. Those who want anything like a perfectly safe environment are calling for the extinction of the human species—a very high-risk program. It is ultimately a religious program. This anti-dominion religion is not Christianity. The biblical goal is the progressive sanctification of the environment as an effect of the progressive sanctification of a growing number of individuals through God's grace. The environment must be progressively healed as a result of God's judgment of blessing on covenant-keeping men, for it was first polluted as a result of God's judgment against covenant-breaking mankind (Gen. 3:18).[84]

M. Brokers Between Generations

All government is representative. Each individual represents God, for better or worse. Each person is responsible before God. We are all stewards. There is no escape. The final judgment is sure. The question then arises: Why should the civil government be a better long-run steward of resources than individual or corporate owners? The fact is, if ownership becomes political, then the only true ownership is the ability of the politician to maintain himself in political office. If ownership is bureaucratic, then it is based on considerations of tenure and bureaucratic advancement. If it is private, familial, or corporate,

83. Mary Douglas and Aaron Wildavsky, *Risk and Culture: An Essay on the Selection of Technical and Environmental Dangers* (Berkeley: University of California Press, 1982).

84. Gary North, *Sovereignty and Dominion*, ch. 11.

then ownership is governed by competitive market considerations. The public is always represented by owners, just as God is; the question is: Which form of representation is appropriate? Which form is most responsive to God and to the public in any given instance?

R. H. Coase quite properly called attention to the problem of state enterprise and responsibility for damages. He remarked that "it is likely that an extension of Government economic activity will often lead to this protection against action for nuisance being pushed further than is desirable. For one thing, the Government is likely to look with a benevolent eye on enterprises which it is itself promoting. For another, it is possible to describe the committing of a nuisance by public enterprise in a much more pleasant way than when the same thing is done by private enterprise.... There can be little doubt that the Welfare State is likely to bring an extension of that immunity from liability for damage, which economists have been in the habit of condemning...."[85]

A proper analysis of ownership, pollution, and responsibility quite properly begins with libertarian economist F. A. Harper's observation that if I do not have the right to disown an asset, I do not really own it. Murray Rothbard extended Harper's comment and applied it to the question of who really owns "public" property. Very important, Rothbard concluded, is the short-run perspective of poloticians, who face re-election battles every few years.

> While rulers of government own "public" property, their ownership is not secure in the long run, since they may always be defeated in an election or deposed. Hence government officials will tend to regard themselves as only transitory owners of "public" resources. While a private owner, secure in his property and its capital value, may plan the use of his resource over a long period of time in the future, the government official must exploit "his" property as quickly as he can, since he has no security of tenure. And even the most securely entrenched civil servant must concentrate on present use, because government officials cannot usually sell the capitalized value of their property, as private owners can. In short, except in

85. R. H. Coase, "The Problem of Social Cost," *The Journal of Law and Economics*, III (Oct. 1960), pp. 26–27. A classic example of this unwillingness of the federal government to police its own agencies is the case of the radioactive waste disposal sites that are believed to be leaking wastes into local environments. Seventeen of these nuclear weapon production facilities in 12 states are owned by the U. S. Department of Energy. Congressman Albert Bustamante of Texas admitted: "Anytime we get into a problem like now, nobody on the committee knows what is what. We just delegate things to the Department of Energy." Fox Butterworth, "Trouble at Atomic Bomb Plants: How Lawmakers Missed the Signs," *New York Times* (Nov. 28, 1988).

> the case of the "private property" of a hereditary monarch, government officials own the current use of resources, but not their capital value. But if a resource itself cannot be owned, but only its current use, there will rapidly ensue an uneconomic exhaustion of the resource, since it will be to no one's benefit to conserve it over a period of time, and yet to each owner's advantage to use it up quickly. It is particularly curious, then, that almost all writers parrot the notion that private owners, possessing time preference, must take the "short view" in using their resources, while only government officials are properly equipped to exercise the "long view." The truth is precisely the reverse. The private individual, secure in his capital ownership, can afford to take the long view because of his interest in maintaining the capital value of his resource. It is the government official who must take and run, who must exploit the property quickly while he is still in command.[86]

Harold Demsetz argued that the private owner serves as a broker between generations. "In effect, an owner of a private right to use land acts as a broker whose wealth depends on how well he takes into account the competing claims of the present and the future. But with communal rights there is no broker, and the claims of the present generation will be given an uneconomically large weight in determining the intensity with which the land is worked. Future generations might desire to pay present generations enough to change the present intensity of land usage. But they have no living agent to place their claims on the market. Under a communal property system, should a living, person pay others to reduce the rate at which they work the land, he would not gain anything of value for his efforts. Communal property means that future generations must speak for themselves."[87]

Because private owners can personally capitalize their efforts to conserve resources ("land"), and pass this asset on to children, or sell it to other private parties who will want to pass the capitalized assets on to future generations, the property's future value can be estimated by a private owner—the demand by future consumers for the output of the resource in question, discounted by the prevailing rate of interest. The lower the rate of interest,[88] of course, the higher the present

86. Murray N. Rothbard, *Man, Economy, and State*, 2nd ed. (Auburn, Alabama: Mises Institute, [1962] 2009), pp. 956–57.

87. Harold Demsetz, "Toward a Theory of Property Rights," *American Economic Review*, LVII (May 1967); reprinted in Furubotn and Pejovich (eds.), *Economics of Property Rights*, pp. 38–39.

88. Lower interest stems from: (1) a lower risk premium (to compensate for debtors' defaulting), (2) a lower price inflation premium (to compensate lenders for the loss of purchasing power of the monetary unit), and (3) a lower social rate of time preference (the more citizens are future-oriented).

value of the capitalized asset. Why? Because the rate of interest discounts the present market value of the expected future stream of income (including personal use value) of a capital asset. The higher the discount, the less the asset is worth in the present. A future-oriented society has a lower rate of interest than a present-oriented society. A lower rate of interest therefore allows future generations to "shout their bids" more effectively to this generation's "brokers" or "auctioneers." It generally takes private, profit-seeking "auctioneers" to hear those bids clearly and act in terms of them. In short, the more that a society conforms itself to the biblical concept of private ownership and a biblical concept of time, the higher the capitalized value of privately owned assets, as a result of the greater attention that profit-seeking owners will pay to the perceived demand of future owners and users.

Summary

The question of resource conservation is intimately tied to the question of time perspective. When we ask ourselves questions concerning resource conservation, we are asking questions regarding conservation for future consumption.

The debate over ecology has been dominated by people who believe (or say they believe) that the civil government has the most responsible view of the future. They do not raise the obvious question: What motivates the individuals who control the various agencies of civil government? What is their motivation regarding pollution and resource conservation compared to the motivation of private owners?

Free market economists stress the long-range motivations of those who own property. When a person sells an asset, he is capitalizing in the present the expected future net productivity of that asset. The individual who can sell an asset owns it. The government bureaucrat cannot legally sell it and pocket the money, so he does not own it. Thus, his motivation is to use the asset in such a way that his income or prestige is increased. He is not paid to represent future generations of users; the private owner is paid to represent those living in the future, for an asset's present price depends heavily on the expected stream of net income it will generate over time.[89]

What we find is what economics predicts concerning the motivation of managers under socialist ownership of the means of production. Managers in socialist nations tend to pollute the environment,

89. The other major considerations are selling costs and the prevailing rate of interest.

use state-owned resources, and ignore the complaints of the politically impotent public. This was especially true of the Soviet Union.[90] Managers used the state's resources to benefit their own careers, which meant meeting state-assigned production quotas. The subtle pressures and rewards of private ownership were missing; socialist plans are crude and focus on aggregate output. Little else matters to the manager, except possibly laying up hidden reserves to barter with or steal and then sell into the black market. He must make his factory's quota (plus a few percentage points more, to earn his bonus). The environment suffers as a direct result.

Pollution is controlled by a combination of widespread private ownership, and local and regional civil government enforcement of Exodus 22:5–6. Socialist ownership is guaranteed to produce pollution because it places at the top of the list the goals of non-owning factory managers.

N. Solutions to Pollution

The first step is to recognize that men are responsible for their actions. The man who pollutes the environment in such a way that it infringes on the way of life of his neighbors must be made to pay restitution. He is responsible; he must pay.

There are always problems in applying this rule. Here are some basic ones. First, it may be impossible to identify a single polluter as the major source of pollution. An entire region may be filled with polluting industries. In this case, the local civil government or governments will have to begin to formulate general policies that encourage all polluters to reduce their polluting activities, even though each polluter cannot be matched precisely with all those who are harmed by the pollution.

This raises some very hard legal questions. The main one is that of strict liability.[91] If a plaintiff cannot prove that a specific polluter hurt

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90. See Appendix I: "Pollution in the Soviet Union."

91. Richard Epstein, an articulate defender of strict liability, contrasted his position with what he called a negligence theory of law. "The development of the common law of tort has been marked by the opposition between two major theories. The first holds that a plaintiff should be entitled, prima facie, to recover from a defendant who has caused him harm only if the defendant intended to harm the plaintiff or failed to take reasonable steps to avoid inflicting the harm. The alternative theory, that of strict liability, holds the defendant prima facie liable for the harm caused whether or not either of the two further conditions relating to negligence and intent is satisfied." Epstein, *A Theory of Strict Liability: Toward a Reformulation of Tort Law* (San Francisco: Cato Institute, 1980), p. 5. He distinguished four cases governing private tort (law suit) action:

his property in a specific physical way, and that he thereby suffered a specific economic loss, then how can he legitimately receive restitution from a supposed polluter? Is a defendant presumed innocent until proven guilty or not? Paul Downing wrote: "Currently, a party who has been damaged by air pollution must prove in court that emitter A damaged him. He must establish that he was damaged and emitter A did it, and not emitter B. This is almost always an impossible task."[92] Murray Rothbard, a proponent of a zero-civil government society, responded: "If true, then we must assent uncomplainingly. . . . Are defendants now to be guilty until they can prove themselves innocent?"[93] Rothbard preferred to live with pollution rather than live with a civil government that does not honor the principle of strict liability in courts of law.

The proper biblical response is that the officers of the state must act as surrogates for injured citizens in this instance. The state must of course prove its case, namely, that the physical effects of the polluting substances are harming specific people in a specific region, or, in the case of noisy automobiles, that the pollutant—"noise"—in almost all known cases involves an infringement on the property rights of citizens who will never be able to locate and prosecute all violators of their rights (legal immunities). Civil law should not ignore the effects on existing property rights that are produced by such social changes as new technology, the crowding of residential areas, the high costs of proving specific damages in a multipolluter environment, and the desire of people to reduce the assault on their bodies and their property.

No perfect system of pollution control (or allocation) can be devised, either by the free market or the state. But to leave the polluters free to pollute just because there are a lot of them to prosecute will only lead to a growth in their numbers and the amount of pollution. Civil law should not subsidize pollution's involuntary transfers of

A hits B; A frightens B; A coerces B to hit G; and A creates dangerous conditions. He advocated the adoption of a rigorous concept of causation. Because he relied so heavily on the nearly absolute nature of private property rights, Epstein's position has become the foundation of the legal theory most popular with anarcho-capitalists of the Austrian School of economics. It should be noted that he admitted that in actual cases, the same outcome is reached by judges who adopt either of the two approaches. "Hence the choice between these two systems comes down to the few, but still important, cases where the outcome will rest upon choice of theory." *Ibid.*, p. 135.

92. Paul B. Downing, "An Introduction to the Problem of Air Quality," in Downing (ed.), *Air Pollution and the Social Sciences* (New York: Praeger, 1971), p. 13; cited by Murray N. Rothbard, "Law, Property Rights, and Air Pollution," *Cato Journal*, II (Spring 1982), p. 88.

93. *Idem*.

wealth by adhering to man-made legal principles that were not designed to deal with every conceivable technological problem—legal rules that have never been applied perfectly anyway.

Nevertheless, there is a definite legal problem here, and Christians should not ignore it. The state can become over-zealous in its prosecution of every known form of pollution. The messianic state is a greater menace to civilization than pollution has ever proven to be. People can at least move away from polluters. Also, the polluters generally live in the local environment, so they have an incentive to restrict the polluting processes. The messianic state is not equally self-limiting or limited by the direct response of the public, especially a public that has lost faith in the God of the Bible and His law.

The main restraint on the advent of a messianic state in a Christian commonwealth will be the inability of the state financially to expand its influence, since the taxing powers of the combined levels of civil government, local to federal, will be limited to less than 10% of national income (I Sam. 8),[94] and it will not have the legal ability to debase the currency, either through debasing precious metals (Isa. 1:22)[95] or by fractional reserve banking (Ex. 22:26).[96] This general restraint on the growth of state power limits the state specifically in the area of pollution control (and in all other areas).

A second problem of enforcing responsibility for pollution is that there may be no way for victims to organize on a costeffective basis in order to gain restitution. The costs of organizing and proving damages in a court of law may exceed the actual, or at least demonstrable, injuries from the pollution.[97] Crocker called these "informational, contractual, and policing costs."

Third, the complexity of the situation may make it difficult for a court to determine just what is fair with respect to compensation. Which firm's smoke hurt what home owner in exactly what propor-

94. Gary North, *Disobedience and Defeat: An Economic Commentary on the Historical Books* (Dallas, Georgia: Point Five Press, 2012), ch. 14.

95. Gary North, *Restoration and Dominion: An Economic Commentary on the Prophets* (Dallas, Georgia: Point Five Press, 2012), ch. 3.

96. Chapter 49:J. See also Gary North, *Honest Money* (Ft. Worth, Texas: Dominion Press, 1986). Cf. North, *An Introduction to Christian Economics* (Nutley, New Jersey: Craig Press, 1973), ch. 1: "The Biblical Critique of Inflation." For an even more detailed analysis, see North, "Isaiah's Critique of Inflation," *The Journal of Christian Reconstruction*, VII (Summer 1980).

97. For an instance of just such a situation, see T. D. Crocker, "Externalities, Property Rights, and Transaction Costs: An Empirical Study," *The Journal of Law and Economics*, XIV (Oct. 1971), pp. 461–62.

tion of the total pollutants in a valley? And how much was he hurt? Contrary to the rarified discussions found in professional economics journals, there is no known scientific way to come up with an answer to the question of damages.[98] There is a lot of guesswork or intuition involved. (Economists should not object too strenuously, since intuition is the bedrock foundation of all humanistic economics anyway.)[99]

Nobody can use the complex mathematical and logical formulas found in the scholarly journals to solve the "externalities" problem.[100] There are other issues to consider. First, did the property owner know in advance about the pollution, and did he buy the property at a discount? In short, has he already been compensated economically for his suffering? Second, has new information on the danger of a particular form of pollution recently become available? If so, did the victim pay too much for the property, even with the discount, and is he entitled to more compensation? Third, is the danger so great to the whole community that the pollution should be stopped entirely? Fourth, if regulations need to be passed to control regional pollution, will the enforcement mechanism be too powerful and arbitrary to preserve freedom, or will it be too weak to achieve its goals? Who decides? What kinds of self-compliance incentives can be built into the law to encourage the polluters to discipline themselves?

1. Incentives and Sanctions

The economists debate about incentives and sanctions. There are several recommended approaches. First, an outright ban on polluting. This is seldom wise. The costs are too high: costs of lost freedom and capital to producers, costs of lost jobs for employees, costs of forfeited tax revenues to the civil government, and lost economic growth when new factories fail to move in for fear of arbitrary, retroactive decisions by regional authorities. Also, it transfers too much power to enforcing agencies.

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98. See Appendix H: "The Epistemological Problem of Social Cost."

99. Gary North, "Economics: From Reason to Intuition," in North (ed.), *Foundations of Christian Scholarship: Essays in the Van Til Perspective* (Vallecito, California: Ross House Books, 1976), ch. 8.

100. For an example of such unrealistic and utterly useless mathematical models, see S. A. Y. Lin and D. K. Whitcomb, "Externality Taxes and Subsidies," in Lin (ed.), *Theory and Measurement of Externalities* (New York: Academic Press, 1976). The authors' model assumes that: (1) private firms and the civil government have perfect and costless information; and (2) the costs of policing are zero. See John Burton's comments, Epilogue, in Cheung, *Myth of Social Cost*, p. 60.

Second, tax credits (deductible against taxes owed to the community or civil government agency that is imposing the law) for installing pollution-control equipment. This gives the polluters an incentive to install the pollution-control devices. It also puts pressure on civil governments to reduce their expenditures to compensate for falling revenues—almost always a desirable political effect. If the civil government raises taxes from other sources, it risks a tax revolt. If it succeeds, however, taxpayers are then forced to pay for cleaner air or water. But if they had bought land under the older conditions—at a discount because of the pollution—they are going to be compensated by rising property values and a more pleasant way of life. This makes higher taxes more bearable.

The problem with the tax credit approach, on the face of it, is that polluters are not penalized. The Bible's rule that the victims should be compensated by the trespassers is seemingly not being honored. The best answer is that the rising concern for ecological purity is placing new environmental standards on producers—standards that did not prevail when they moved into the region to start business. The local residents got the benefits—more jobs, lower-priced land, perhaps a lower property tax rate—and are not entitled to direct restitution, except by the better environment they will receive. Thus, if residents want less pollution, they have to pay for it. One way to pay for this is to allow profitable manufacturers the right to pay fewer taxes.

Third, progressive fines for polluters: the more pollution, the higher the fines. In effect, this allows polluters to "buy" the right of polluting. They must assess the value to them of continuing to pollute. They get no more "free lunches" in the form of an open sky or stream. The fines can be experimented with by the local civil government to reduce the worst kinds of pollution without bankrupting local businesses. If the money is used to reimburse victims directly or indirectly by lowering tax rates, this follows the biblical injunction.

If the fines are used by the bureaucrats and politicians to expand the civil government, then this is not what the Bible requires. There is always a great temptation by the civil government to use the fines to expand their power. The tax credit approach seems to be a better way to restrict the expansion of civil government. Higher taxes unquestionably act as an incentive to make changes as the output ofpollutants increases. If the goal is to "put a lid on pollution, a graduated fine system is effective. But there are problems with defining

legitimate fines or charges for any given level of pollution. There is no science of appropriate fines.[101]

Fourth, in the case of a localized polluter that is affecting only land close by, the civil government can establish specific pollution standards, such as parts per million. The company can then be given a choice: meet the standards, or buy the lands that are being affected. This was done in Polk County, Florida, in the late 1950s when phosphate producing plants were reducing the value of adjacent cattle land and citrus properties. The companies could then decide which to do: pay for more pollution-control equipment or pay for the land. Increasingly, they bought the land, as the marginal cost of each additional increase in pollution control climbed much higher. In the mid-1950s, the companies had owned 50% of the affected land; by 1964, they owned 80%.[102]

There are other possible solutions, but any workable long-term solution will have to be at bottom voluntaristic. We need greater decentralization of our population. It is the concentrated population of the modern city that is the great burden to the environment. The advent of decentralized power-generation systems whould enable people to move to less expensive land in presently less populated regions. The strain on the environment will be reduced. With the advent of a low-cost system of international telecommunications through the Internet, another barrier to small town and rural living is gone. Because we can now educate and entertain ourselves without hooking up to wires, "wireless" living is capable of making possible lower-pollution living. If technologically advanced societies continue to sell information rather than manufactured goods, substituting high-technology, low-pollution manufacturing for older steel mills and automobile plants, then we can escape both big government and pollution. Something approaching the kind of decentralized utopia outlined by Tofler may not be that far away, technologically speaking.[103]

All talk in scholarly economic journals about the ability of science to discover socially "optimal" levels of pollution is as far-fetched as science's ability to come up with socially optimal anything (especially an optimal investment of scarce economic resources in scientific reports). Because humanistic economists cannot scientifically make in-

101. Peter Lewin, "Pollution Externalities: Social Cost and Strict Liability," *Cato Journal*, II (Spring 1982), pp. 214–15; Jerome Millimen, "Can Water Pollution Policy be Efficient?" *ibid*.

102. Crocker, "Externalities," pp. 456–59.

103. Alvin Tofler, *The Third Wave* (New York: Random House, 1980).

terpersonal comparisons of subjective utility, it is illegitimate to assert the ability of any economist or other scientist to offer advice or data on how to achieve socially optimal anything. All the equations in the world will not add one iota of knowledge that will prove useful to any economist who relies exclusively on subjective economic theory in his search for socially optimal levels of pollution. (If the equations are sufficiently elegant to be utterly irrelevant, they could, on the other hand, win the developer a Nobel Prize in economics.)

The modern state is becoming messianic. Its supporters believe that salvation is essentially political. Thus, they promote state action in their efforts to heal the environment. Instead, we should begin with the issue of legal responsibility. Individuals are to be held accountable for their actions—by God, by the civil government, and by the free market.

When many polluters are harming many people, the state must intervene and impose sanctions against all producers of the particular type of generally unwanted pollution. But in doing so, the officials must count the costs to society of the intervention's effects of people's faith in private ownership. The intervention must be made in terms of a defense of private property rights, not its abolition. The rise of the messianic state is a greater threat to liberty than pollution is. Pollution is a recognized evil; the messianic state is the agent of a rival religion.

A whole system of incentives and sanctions is available: fines, tax credits, pollution control standards, and even outright prohibition. What must be recognized is that the quest for zero pollution is messianic. It is a program that covers the real intent of its promoters: salvation by legislation. If men do not restrain themselves voluntarily as both polluters and pollution-fighters, the social order will be torn apart by the messianic quest for the perfect environment. Such an environment is available only after the final judgment, when the curse is removed (Rom. 8:19–22).

O. The Messianic Quest for Zero Pollution

The question of pollution, ultimately, is a question of stewardship, meaning personal responsibility. The Bible affirms that each man is responsible for his actions. No man is to pass along the costs of his activities to his neighbor, apart from the latter's consent. Where there is ownership (legitimate sovereignty), there must also be responsibility.

Perfect justice in this regard is impossible, and any attempt to create a completely pollution-free environment is doomed to failure.

After all, men exhale—a form of pollution that unquestionably has some environmental consequences. Furthermore, it is not possible to assess the full costs of pollution, since estimating costs necessarily requires men to make interpersonal comparisons of subjective utility, and such comparisons can be made only imperfectly.[104] Arbitrary estimates must be made by judges, arbitration committees, or administrative bureaucracies in charge of pollution-control programs. These will not be "scientific" estimates, for such measurable estimates cannot be made in economics. As Dales admitted, "the economist is quite unable to draw up a neat table showing all benefits and all costs of all anti-pollution policies that are proposed (or that might be proposed); he is therefore quite unable to say that one policy is demonstrably superior to all others.... At the moment, the subject is humility."[105] Perfection here cannot be achieved at any cost.

The example of the phosphate companies of Polk County, Florida, is representative. Achieving 95% efficiency in controlling emissions was economically possible. The last 5 percent would have bankrupted the companies. "Once an efficiency level of 95 per cent has been attained, it is clear that further increases in efficiency become relatively unresponsive to additional capital outlays. For plants at least ten years old in 1965, it is unlikely that the 97 per cent efficiency level can even be reached. The plant less than ten years old required an outlay of almost one-half million dollars to move from a 98 to a 99 per cent level of efficiency. Two two-year old plants needed a quarter million dollars to increase their control efficiency from 99.1 to 99.2 per cent."[106] In 1968, the Pennsylvania Power Company of Newcastle, Pennsylvania spent $2 million on a facility to reduce fly ash and suspended particulates discharged by the plant. To attain 99% removal, the firm had to spend an additional $4 million.[107]

Citizens must use self-discipline in their quest for a better world. If every citizen is forever suing his neighbor for each perceived infringement on his environmental lifestyle, society will perish. This is the great danger of class-action suits by one person in the name of an unspecified number of others in a supposed "class" of victims. Each person can sue a company, which may be operating within the law, thereby imposing endless legal fees on the firm. This could tie up a

104. North, *Sovereignty and Dominion*, ch. 5.
105. Dales, *Pollution*, pp. 39, 40.
106. Crocker, "Externalities," p. 458.
107. Hite, *Economics of Environmental Quality*, p. 25.

firm's legitimate operations. Such suits could be brought by anyone for almost any perceived infraction: automobile safety, national defense, and on and on.[108] Those who bring class-action suits that are determined by a jury to constitute unwarranted harassment of a business must be put "at risk" for their actions. Everyone must become responsible for his actions, not just producers.[109]

Ours is not a perfect world, and any attempt to impose perfect standards on it, without acknowledging the limits imposed by scarcity, and therefore the costs involved, is demonic. The whole community will be harmed. "As costs rise for persons who must treat more and more of their wastes so that other persons can enjoy more and more purity, it will become apparent that the party who wants pure water is hurting the environment for the party who wants food, clothing, and shelter."[110]

Any civil government that attempts to reduce pollution to anywhere near zero is messianic. The results of a quest for zero pollution will be similar to the results of a quest for perfect justice: bankruptcy of the treasury, bankruptcy of producers, judicial arbitrariness, and an increasing number of economic disruptions.[111]

The following piece of legislation, Senate Bill 2770, passed by the United States Senate by a vote of 86 to 0 in 1971, is indicative of this sort of messianic role for the state: "This section establishes a policy that the discharge of pollutants should be eliminated by 1985, that the natural chemical, physical, and biological integrity of the Nation's waters be restored, and that an interim goal of a water quality allowing fish propagation and suitable for swimming should be reached by 1981. The states are declared to have the primary responsibility and right to implement such a goal.[112] At least the Senate was wise enough to pass along "primary responsibility" to achieve these unattainable goals to the state governments. Since these goals were not attained, should someone ever remind the politicians about this bill, the Senate can blame someone else for its failure. Should the national government decide to impose sanctions in a futile attempt to achieve zero water pollution, it will mean the end of personal freedom for United States' citizens.

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108. *Ibid.*, p. 91.

109. On the legal problems associated with class-action suits, see the critical comments by Murray N. Rothbard, "Law, Property Rights, and Air Pollution," *op. cit.*, pp. 93–97. See also Huber, *Liability*, ch. 5.

110. Hite, *Economics of Environmental Quality*, p. 91.

111. Macklin Fleming, *The Price of Perfect Justice* (New York: Basic Books, 1974).

112. Cited in Hite, *op. cit.*, p. 92.

Summary

The Bible tells us to count the costs of our actions (Luke 14:28–30).[113] We cannot avoid the inescapable reality of scarcity in our cursed world. We are creatures who labor under a curse, and our environment is also under a curse. It is therefore as messianic to expect to be able to achieve a zero-pollution world in history as it is to expect to be able to achieve a sinjree world in history.

The pollution that we experience is simply a "side effect" of man's sin—the thorns and weeds with which God has cursed us (Gen. 3:18). We are told to be perfect, even as our Father in heaven is perfect (Matt. 5:48). Perfection is the standard by which we are judged by God in both time and eternity. We are to strive toward this goal, but never in the hope of being able to achieve it in history, and never by means of political power alone. The same standard of perfection exists for our environment. Mankind is supposed to dwell in a pollution-free environment that matches his sin-free environment. When God's curse is removed from the creation after the final judgment, sin will no longer be a problem for mankind. Neither will pollution. But that perfect environment will be trans-historical.

To devote scarce resources to reduce sin is legitimate judicially and morally mandatory. To devote resources to reduce pollution is equally legitimate judicially and morally mandatory. Nevertheless, the task of reducing sin is not God's monopoly assignment to the state; neither is the reduction of pollution. We must avoid perfectionism and its institutional concomitant, the messianic state.

Conclusion

The Bible provides us with moral and legal guidelines that will permit those who abide by biblical law to serve as stewards of God's resources. As in any stewardship activity, sin reduces our ability to achieve perfection. The earth is cursed. We cannot legitimately expect to achieve perfect results. Nevertheless, we can expect God's blessings on our activities if we faithfully apply ourselves to the terms of the dominion covenant.

The free market allows us to estimate individual costs and benefits. A combination of political authority and free market allocation is needed to allocate the disposal of waste products. It is sometimes impossible to allocate private property rights, including waste disposal

113. North, *Treasure and Dominion*, ch. 35.

responsibilities, and the civil government has a role to play in this allocation process. The local civil government, governed by the value preferences of local residents, should have the primary responsibility in this regard. Larger units of civil government are to enter into the allocation process only because there are disputes between local units of government. The goal is to assign responsibility for cleaning up waste products to private beneficiaries of waste production (lower-cost producers and their clients), or when this proves too costly for them to remain in business, then to allow community standards of the majority to allocate the production and distribution of pollution in order to retain the local economic benefits that these polluters also produce.

Without market pricing of resources, underpriced resources tend to be overused by profit-seeking (cost-reducing) users. This has led to the so-called tragedy of the commons. Commonly owned property is treated as a cost-free resource. The individual users overgraze, overpollute, or generally abuse it because they receive the immediate benefits (lower costs of production) and share in the liabilities only as members of a large, diffused group—the "owners."

1. Spillover Effects

We must treat the pollution issue as a "spillover" effect. The Bible's case law regarding fire is applicable to pollution in general. One man's actions impose costs on other people, and this should not be allowed without their express or implicit permission. He who imposes damage must make restitution to the victims. But we must recognize that buying property at a discount because of existing pollution constitutes "restitution in advance." It is often legitimate under such circumstances to allow polluters to continue polluting.

Pollution is not always harmful (e.g., a bakery's scent). Sometimes some form of pollution is harmful, but people may not recognize this. To hold men accountable retroactively for the recently recognized harmful effects of prior pollution is to treat people as if they were omniscient. If such penalties were automatically imposed as a matter of law, innovation would be stifled.

The civil government enters as an indirect allocator of pollution when markets fail to allocate pollution efficiently. This is necessary in most instances because property rights cannot be assigned to moving fluids. The state protects victims of unauthorized pollution. But this task is generally a local responsibility, for people in different com-

munities may be willing to tolerate more pollution than others, if the economic payoff is high enough. The market then allocates pollution, given the state-enforced liability system. The state creates a kind of auction for pollution where the "high bid" (high tolerance) wins.

Pollution should be seen as a form of trespassing. It is an invasion of private property. The state has a responsibility to enforce property rights against trespassers; similarly, it has a responsibility of enforcing laws against polluters. This would include legislating fire codes (pre-pollution restrictions) and automobile emissions and noise-reduction devices.

We must recognize, however, that many of the most vocal opponents of pollution are in fact wealthy people who are attempting to keep less wealthy people from invading "their" common property. The ecology movement is dominated by upper-middle class people and the rich. They are articulate. They are threatened by the combined economic bidding of poorer people. They have mobilized people to pressure the politicians to pass laws that favor a narrow special-interest group. By passing such all-encompassing legislation, especially at the national level, politicians are subsidizing the politically skilled minority whose interests frequently are at odds with the less skilled majority. The language of environmental ethics can be easily misused. In our day, the ecology movement has reflected a general attitude that is hostile to dominion. It has proclaimed the sovereignty of nature over covenant man.

2. Biblical Intuition vs. Humanist Science

Nevertheless, it is not possible to make a valid biblical case against all pollution legislation. Some defenders of the autonomous free market deny that the civil government has any responsibility in the area of pollution control. This clearly is a policy recommendation. When these intellectual defenders of the free market are challenged to answer one crucial question—the question of how economists can scientifically formulate social policy if they cannot make interpersonal comparisons of subjective utility—they are forced by the logic of their position to affirm a sort of intellectual agnosticism. As scientists, they must remain silent about social policy. They cannot possibly tell us as citizens or tell society's judges just how much pollution is "socially optimal," or how much restitution is "efficient" in the reduction of pollution. They do not accept the idea that Goddirected and biblical law-affirming civil judges have the ability to make these intuitive

judgments, but if economists are intellectually honest, they must also admit that all such judgments are necessarily intuitive, not "scientific."[114] There can be no "scientific" economic judgments regarding social policy in a world in which it is impossible to make interpersonal comparisons of subjective utility. I keep stressing this point throughout this commentary series because it is the Achilles heel of modern subjectivist economics. Nowhere is this epistemological problem more crucial or less solvable than in the field of pollution control.

The Christian knows that God can and does make such interpersonal comparisons. God knows how much pollution is optimal in any society at any point in time. His law-order is designed to enable God-fearing and biblical law-honoring societies to approach this optimum level of pollution, though not attain it perfectly. Christians who understand and believe Deuteronomy 28:1–14 also know that God has promised great blessings to those who seek to conform themselves to His law. These blessings presumably include reduced pollution, both as a benefit to man and the environment, but also because man is responsible for this environment. Such blessings are the product of a property rights system that honors the Bible's guidelines. The Bible gives us moral and legal guidelines, and biblical economics alerts us to the costs and benefits involved in the resolution of disputes concerning the proper level of pollution.

Our long-run goal is perfection, of course: ethical perfection. But we know that we are cursed sinners living in a cursed world. We aim at perfection as an ethical ideal, but we do not wring our hands in despair because we cannot attain perfection, in time and on earth. We know the costs associated with state-enforced programs that promise perfection and establish sanctions against those who do not achieve it. Those costs are too high.

114. Gary North, "Economics: From Reason to Intuition," in North (ed.), *Foundations of Christian Scholarship*.

45

SAFEKEEPING, LIABILITY, AND CRIME PREVENTION

> *If a man shall deliver unto his neighbour money or stuff to keep, and it be stolen out of the man's house; if the thief be found, let him pay double. If the thief be not found, then the master of the house shall be brought unto the judges, to see whether he have put his hand unto his neighbour's goods. For all manner of trespass, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing, which another challengeth to be his, the cause of both parties shall come before the judges; and whom the judges shall condemn, he shall pay double unto his neighbour.*
>
> EXODUS 22:7–9

The theocentric issue here is man's stewardship to God, point two of the biblical covenant.[1] God delegates control over His property to men for safekeeping. Men are to do the same. *Delegation is basic to dominion*.

Part of ancient Israel's concept of neighborly hospitality[2] involved taking care of the neighbor's property from time to time. Exodus 22:7–9 deals with inanimate property as well as animals. Exodus 22:10–13 deals exclusively with animals entrusted to another's care.[3] The existence of case laws governing safekeeping testifies to the fact that it was considered socially acceptable for an Israelite to ask his neighbor to safeguard his goods temporarily. This should also be true for modern Christians. Neighborly safekeeping is clearly a benefit to

1. Ray R. Sutton, *That You May Prosper: Dominion By Covenant*, 2nd ed. (Tyler, Texas: Institute for Christian Economics, [1987] 1992), ch. 2.

2. James B. Jordan, "God's Hospitality and Holistic Evangelism" (1981), in Jordan, *The Sociology of the Church: Essays in Reconstruction* (Tyler, Texas: Geneva Ministries, 1986), pp. 207–20.

3. Chapter 50.

a man who is taking his family on a journey. He needs someone to watch over his possessions.

The neighbor is expected by both God and man voluntarily to accept this caretaking responsibility. Why? Because God accepted this same responsibility in ancient Israel. God promised to serve the Israelites as the safekeeper of their goods when they journeyed to Jerusalem to celebrate the feasts. "For I will cast out the nations before thee, and enlarge thy borders: neither shall any man desire thy land, when thou shalt go up to appear before the LORD thy God thrice in the year" (Ex. 34:24). Men are therefore to imitate God by guarding their neighbors' property when the latter go on journeys. God the cosmic Safekeeper and Caretaker is the theocentric frame of reference for these verses. Covenant-keeping man must be like God.

Adam was entrusted with the task of guarding God's property in the garden. God told Adam that the tree of the knowledge of good and evil was off-limits to him. Then God departed from Adam's presence, as if He was going on a journey—the theme of the New Testament's parable of the talents (Matt. 25:15).[4] God tested Adam's faithfulness in a particular way: to see if Adam would protect God's property from an invader during His absence. Instead of defending God's property from this invader, the serpent, Adam and Eve listened to the invader and did what he suggested: join in a covenantal alliance with him by sharing a covenant meal in his presence at the forbidden tree. God also tested Adam to see whether he would "put his hand unto his neighbour's goods." God was Adam's neighbor, which was a special privilege for Adam. But to maintain good relations with this cosmic Neighbor, Adam and Eve had to pass the test of hospitality. They failed the test. Thus, they owed God double restitution: death in history and death in eternity.

A. Representative Laws

Because God tested Adam's covenantal faithfulness by testing Adam's commitment to be an honest safekeeper, we should conclude that the Exodus case laws governing safekeeping have broad implications for the life of man. The caretaking laws are therefore representative laws. Samson Raphael Hirsch, the mid-nineteenth-century Jewish commentator, wrote that verses 7–15 (6–14 in the Hebrew Torah) deal with "responsibilities which are incurred in the case of duties which

4. Gary North, *Priorities and Dominion: An Economic Commentary on Matthew*, 2nd ed. (Dallas, Georgia: Point Five Press, [2000] 2012), ch. 47.

are voluntarily undertaken." He divided the cases in terms of four participants: the unpaid custodian, the paid custodian, the borrower, and the hirer. "In working out the different responsibilities incurred, and in the laws laid down regarding them, many general basic laws of civil law and justice are incidentally laid down, laws which have far-reaching application."[5]

This passage covers criminal behavior: *theft*. It specifically refers to a *trespass*. In contrast, Exodus 22:10–13 deals with the caretaker's *negligence*. The requirement here that double restitution be imposed by the judges indicates that this law deals with a criminal trespass. Not so in the case of Exodus 22:12: "And if it be stolen from him, he shall make restitution unto the owner thereof." Double restitution is the penalty for criminal theft; value-for-value restitution is the penalty for negligence.

This passage does not indicate that the neighbor who receives the goods is given any kind of payment for his trouble. The rabbis so interpreted it.[6] Hirsch said that this passage deals with "a custodian who is not responsible if the object left in his charge is stolen from him," whereas the custodian in verses 10–13 is "one who has to pay compensation in such a case...and who is only free from responsibility if the property is lost in a manner which could not possibly have been prevented." Citing the Talmud,[7] he added: "A non-paid custodian in accepting custody, implicitly undertakes to give the entrusted goods the same care that he normally gives to his own property e.g., that at night time he places them in a securely closed place. But a paid custodian (unless of course, special conditions are agreed) implicitly accepts the duties of a watchman, so that even if he leaves it out of his personal surveillance he would be responsible even if it were stolen by thieves breaking in to properly closed premises."[8] I am not persuaded that Hirsch was correct about the legal distinction here being based on paid vs. unpaid custodianship, because I believe that the dividing issue is theft vs. negligence, but his comments indicate that he and the rabbis had given considerable thought to the meaning and application of these verses. He devoted ten pages to expositing just Exodus 22:7–9, more than he devoted to almost any other passage in the case law section of Exodus.

5. Samson Raphael Hirsch, *The Pentateuch Translated and Explained*, trans. Isaac Levy, 5 vols., *Exodus*, 3rd ed. (London: Honig & Sons, [1860?] 1967), p. 348.

6. Rabbi Moses ben Nachman [Ramban], *Commentary on the Torah: Exodus* (New York: Shilo, [1250s?] 1973), pp. 378–79.

7. *Baba Kamma* 57a; *Baba Metzia* 93b.

8. Hirsch, *Exodus*, p. 348.

B. Preserving Godly Social Order

It is not specified in the text just why the owner would transfer his assets to a neighbor, although an obvious reason would have been an upcoming journey. The fear of thieves would have motivated a man to entrust his capital to a neighbor.

1. Reducing Crime

The nature of the liabilities imposed by this and the related safekeeping passage (Ex. 22:10–13) indicates that the primary intent of the laws governing safekeeping was to reduce crime. Members of the covenant community are expected voluntarily to take on certain limited responsibilities in order to place the criminal at a disadvantage. The maintenance of godly social order is the goal of these laws.

A thief, then as now, would have looked for telltale signs of an abandoned house. When houses are empty, they are vulnerable to invasion: a boundary violation. The motif of the "empty house" is found throughout Scripture, most notably in the threat of God to abandon the House of Israel, symbolized by His departure from the temple, should Israel rebel against Him (Ezek. 8–11). Covenantal emptiness is a spiritual condition to be avoided. It cannot be maintained; something will always fill a covenantally empty place, whether an individual soul or a social order. In Jesus's parable of the swept house, He compared a house to man's heart, and then to the spiritual condition of the Jewish culture of His day. When a man "sweeps" out an evil spirit, but then leaves his "house" empty, the spirit returns with seven other spirits, all worse than the first, and reoccupies the house (Matt. 12:43–45). In short, from a spiritual standpoint, "you can't beat something with nothing." The covenantal "house" is not to be left empty. There can be no ethical or spiritual vacuums in life.

2. Stewardship and Dominion

The case laws governing safekeeping point to this important covenantal truth. Valuable property must be under someone's administration if it is to be protected. It must be cared for. The thief who finds an empty house is more likely to be able to commit his crime undetected. *Guarding private property is therefore an important aspect of the dominion covenant*. Because all property belongs to God, the steward is required to be faithful in caring for whatever property has been assigned to him by God to guard, just as Adam was to care for God's garden. The steward must seek to preserve it intact. In cases when a

person needs to go on a journey, and cannot carry all of his property with him, or fears to carry it because of highway robbers, he must locate a local guardian. Keeping thieves from breaking in and taking property is very important.

Because ownership is inescapably covenantal, and because neighbors are involved in a civil covenant with each other, the owner transfers limited and temporary control over his property to his neighbor. Neighbors have an incentive to reduce crime in the neighborhood. This was especially true in agricultural ancient Israel. Rural neighbors are more dependent on each other than urban neighbors are. There is less commerce with those outside the local community than there is in a city, which is a trade center. In other words, there is a reduced division of labor in a rural area. Rural residents are therefore more dependent on each other's productivity than residents of a city are. This was especially true before the revolutionary development of mail-order catalogue marketing.[9] Rural residents have a unique economic incentive to preserve the wealth of their neighbors, for it is always better to have a prosperous neighbor nearby, because a wealthy neighbor has more goods to exchange with his neighbors, and more assets to help them in a crisis.

Additionally, wealthier neighbors are a social asset. This is why the influx of richer neighbors into the neighborhood has a tendency to increase the market value of local real estate.[10] Envy and jealousy against those with greater wealth are evil impulses that threaten the covenantal integrity of a neighborhood, for they make the wealthier residents secretive and distrustful of their neighbors.[11] These twin evils therefore reduce voluntary local cooperation and planning.

When neighbors can be trusted to care for each other's goods, a society probably has a strong covenantal bond. Residents see the

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9. Peter Drucker, *Management: Tasks, Responsibilities, Practices* (New York: Harper & Row, 1974), ch. 5: "Managing a Business: The Sears Story."

10. The best example of such a process in the United States in recent years is the movement of upper-middle-class whites into crime-ridden urban ghetto areas, especially in Washington, D.C. Crime decreases, housing is improved by the new owners, and then unimproved local property values rise. This does lead to the displacement of former residents, however. But "movement in" usually involves "movement out" in real estate transactions.

11. The sociologist Helmut Schoeck argued that envy—the desire to tear down someone simply because he is better off—is always a phenomenon of social proximity. Helmut Schoeck, *Envy: A Theory of Social Behaviour* (New York: Harcourt, Brace & World, [1966] 1970), pp. 20, 40, 62, 121, 189, 220, 237, 273, 349, 355. Social proximity is commonly very closely related to geographical proximity, at least in modern urban societies.

thief's threat to the neighborhood, and they cooperate in order to make the thief's task more difficult. A similar bond is seen in the urban "neighborhood watch" societies, in which residents of a neighborhood join together in a voluntary agreement to keep an eye on each other's homes, and to report anything suspicious to the police. The social atomization of the typical modern urban neighborhood, in which people do not know the names of their next-door neighbors, or the neighbors two houses down the street, favors the thieves.[12]

C. Accepting Responsibility

So common was the entrusting of goods to neighbors in Israel that the case laws established rules governing the practice. The case laws' provisions still govern similar relationships today. When a man accepts the task of guarding his neighbor's property, he thereby accepts a considerable degree of personal liability. Control is inescapably tied to ownership.[13] Yet, in this case, the controller is not the legal owner. This places certain disadvantages on him.

1. Legal Responsibility and Economic Responsibility

We must distinguish here between legal responsibility and economic responsibility, lest there be any confusion about the nature of the responsibility of the safekeeper. Ownership is inescapably connected to economic responsibility. Ownership is a social function; it is a stewardship function.[14] Owners must decide, moment by moment, what to do with the assets they own. Moment by moment, others are bidding in the market for the services, animate and inanimate, that

12. A profitable tactic for thieves in urban America is to buy, hire, or steal a large moving van, paint counterfeit company symbols on its sides, drive up to a house while the family is away, load the van with the family's household goods, and drive away. So impersonal are most American neighborhoods that the neighbors seldom report this activity to the police as it is taking place. They simply assume that the family is moving away. They do not regard it as remarkable that the departing family never said goodbye to anyone. American families seldom say hello to anyone living next door or across the street, year after year.

13. This is why the fascist states of the 1930s were really socialist economies. Ownership of industry was officially retained by private individuals, but control over industrial assets was placed in the hands of state bureaucrats. Cf. Guenter Reimann, *The Vampire Economy: Doing Business Under Fascism* (New York: Vanguard, 1939). This has been reprinted by the Mises Institute. This was the only detailed English-language book on the German economy under the Nazis until Adam Tooze, *The Wages of Destruction* (New York: Viking, 2006). That is over 65 years—an astounding academic oversight.

14. Gary North, "Ownership: Free but Not Cheap," *The Freeman* (July 1972). Reprinted in North, *An Introduction to Christian Economics* (Nutley, New Jersey: Craig Press, 1973), ch. 28.

each person owns. The moment this bidding process ceases, the price of the asset in question falls to zero, and therefore it ceases to be a scarce economic resource. The existence of a price testifies to the existence of the competing bids for ownership. There is no escape for a property owner from these God-imposed economic functions and responsibilities. Arrangements can be made to distribute these ownership functions among those who are willing to bear certain kinds of risk, such as through insurance contracts, but with the ownership of legal titles to property inevitably comes a "bundle of rights" (legal immunities from specified kinds of physical interference) and therefore a "bundle of responsibilities" (economic obligations to the market).[15]

Exodus 22:7–15 is not speaking about inescapable, God-imposed economic responsibilities of ownership. It speaks instead about certain *legal* responsibilities that pass to the safekeeper even though he is not the owner of the property. Biblical law spells out these legal responsibilities. A neighbor can be held accountable in a court of law for his actions. In the case of missing goods, the man to whom the property has been entrusted must give an account for the missing property. "For all manner of trespass, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing, which another challengeth to be his, the cause of both parties shall come before the judges; and whom the judges shall condemn, he shall pay double unto his neighbour" (Ex. 22:9). This is the case of suspected *trespass*. It involves a suspicion of criminal behavior. Double restitution is therefore the penalty upon conviction (Ex. 22:4).

2. Why Only Double Restitution?

Notice that the passage specifies double restitution for a stolen sheep. Clearly, the convicted caretaker has either eaten the sheep or has sold it; otherwise, there would be no court case: the animal would

15. These economic responsibilities stem directly from the legal immunities of others in the marketplace. Owners of assets in a free society possess a legal right to bid for ownership of other people's property. This is sometimes called *consumers' sovereignty*. An early use of this term is found in W. H. Hutt, "The Nature of Aggressive Selling," *Economica*, 12 (1935); reprinted in *Individual Freedom: Selected Works of William H. Hutt*, eds. Svetozar Pejovich and David Klingaman (Westport, Connecticut: Greenwood, 1975), p. 185. The concept of consumer's sovereignty is incorrect. Sovereignty is an aspect of civil law: legal title. Authority is an aspect of economics: economic stewardship. The phrase should be "customer's authority." In this case, the present owner is also a consumer: he holds the property for himself. The interaction of the bidders determines the price of the good. Responding to these offers is the inescapable economic responsibility of the present legal owner: no response is in fact a response of "no."

be in the caretaker's herd. The suspected neighbor would simply return the animal to its owner. Then why only double restitution in this instance? Four-fold restitution is imposed on the thief who kills or sells a sheep (Ex. 22:1). The answer is that one of the reasons why there is a higher penalty imposed for stealing and destroying a sheep or ox (specially protected because of their symbolizing mankind) is that it is difficult to locate and convict the unknown thief.[16] In the case of a neighbor, there is greater ease (i.e., less expense) of conviction; the owner knows who had possession of it last. Because there is lower risk of detection for a stranger who commits the theft, there are increased criminal penalties to offset this lower risk.

There are risks for both of the disputants when they go to court to settle the conflict. The neighbor who brings a false accusation, as distinguished from a mistaken accusation, risks being condemned by the judges. He would then be required to pay double restitution to the falsely accused victim, the same penalty that the latter would have suffered (Deut. 19:18–19).[17] Bringing a false accusation is a form of perjury, and the law of perjury applies: forfeiting to the victim what the victim would have been required to forfeit as a result of the false testimony (Deut. 19:19). Understand, however, that the victim would have to prove that the accuser had knowingly accused him falsely.

3. Implied Trust and Presumed Innocence

Because of the implied trust that the first man had in the character of the second person, it becomes difficult for the judges to convict the second man for theft, a criminal act. The owner's original decision to trust the neighbor indicates that he believed the person to be honest. The judges must therefore operate with the presumption of the innocence of the accused, just as the owner had originally operated. This difficulty of gaining a conviction adds to the risk borne by the accuser if he decides to charge his neighbor with criminal trespass (Ex. 22:7–9) rather than mere negligence (Ex. 22:10–13).[18]

The property owner is unwilling to bear the full legal responsibilities and costs of ownership by paying someone to perform this service. He therefore decides to transfer some of this legal responsibility to a neighbor. By leaving, the owner must bear an added de-

16. Chapter 17.

17. Gary North, *Inheritance and Dominion: An Economic Commentary on Deuteronomy*, 2nd ed. (Dallas, Georgia: Point Five Press, [1999] 2012), ch. 45.

18. Chapter 51.

gree of risk. His neighbor may turn out to be a criminal negligent. If his neighbor is willing to lie to the judges, it will be very difficult to prove criminal action. "If a man deliver unto his neighbor an ass, or an ox, or a sheep, or any beast, to keep; and it die, or be hurt, or driven away, no man seeing it: Then shall an oath of the LORD be between them both, that he hath not put his hand unto his neighbour's goods; and the owner of it shall accept thereof, and he shall not make it good" (Ex. 22:10–11). Thus, there is *shared risk*: the owner imputes trustworthiness to the neighbor, and the neighbor takes on added legal responsibility. The requirement of the oath reduces risk to the property owner, however, if the safekeeper believes in God. (The modern loss of faith in God has unquestionably increased the level of risk in society, as well as having increased the difficulty of gaining judicial convictions.) The compulsory oath is an important biblical device for promoting civil justice.[19] The accused may remain silent, but if he speaks, he is required to tell the truth, the whole truth, and nothing but the truth. He is not to place his accusers under the risk of loss through his false testimony.

D. Compulsory Judicial Oaths

1. Reducing State Power

Why should the Bible authorize the civil government to require covenant oaths from all witnesses? Why should the accused be required to testify under oath, and therefore be under the threat of both civil and ecclesiastical sanctions? *Because the state is not allowed by God to attempt to read the mind of any witness*. Far from being a means of enhancing state power, the compulsory oath is a device that is intended to restrain state power. By making it possible for the state to impose sanctions against convicted perjurers, biblical law removes from the judges any presumed authority to read the mind of a witness. The witness' false public testimony against the accused can later be used against him (perjury).

To render justice, the court needs accurate information. The court is legally *entitled* to accurate information from all third-party witnesses

19. Is the state authorized by God to compel testimony from the oath-taker if he is the accused? Yes, except in cases when the accused is being charged with the sin of blasphemy against God or treason against the state, as Jesus was. He refused to answer Herod (Luke 23:9) and Pilate (Matt. 27:14). His silence was the His fulfillment of Isaiah's messianic prophecy (Isa. 53:7). This was not a case involving alleged damages suffered by another oath-taking individual, as in Exodus 22:1.

who are called by law to testify. The compulsory oath is God's authorized means of lowering the court's cost of attaining such knowledge. The accusing witness is not allowed to hide his thoughts because *the state is not allowed to imitate God by claiming to be able to search the hearts of men*. For instance, testimony based on "lie detector" tests or on such occult arts as mind-reading, hypnotism, and information revealed in dreams or trances is biblically invalid.

The court is God's agency of justice and temporal judgment. Civil judges represent God in history. A witness is no more allowed to testify falsely to a lawful civil court than he is allowed to testify falsely to God.[20] A third-party witness is required to reveal every-thing he knows about the facts of the case when asked specific questions under legitimate cross-examination.

The witness is required to swear an oath before God, and not just before the earthly judges. He invokes God's name and therefore invokes God's sanctions. The civil court-imposed oath is therefore a true covenantal oath, for all covenantal oaths are self-maledictory under God.[21] By invoking God's sanctions by taking a judicially valid oath, the witness faces negative sanctions, not just from the court in case his perjury is detected, but from God who knows all hearts. The witness is reminded by the oath that *God will condemn him if he gives false testimony, for God knows the thoughts of men*. This is why offering false testimony under oath places a man under God's sanctions, and why the sinner owes a trespass offering to the church, God's agency of excommunication, rather than to the state, God's agency of the sword: "And he shall bring his trespass offering unto the LORD, a ram without blemish out of the flock, with thy estimation, for a trespass offering, unto the priest" (Lev. 6:6).[22]

2. Hammurabi's Code

The oath was also used in Hammurabi's Babylon. Speaking of the seignior, or aristocrat, the law states: "If a seignior deposited grain in a(nother) seignior's house for storage and a loss has then occurred

20. False testimony is legitimate when the court is illegal, or is demanding information that it is not entitled to. For example, Pharaoh's "court" was not entitled to accurate information from the midwives regarding the birth of male Hebrew children. They could legitimately lie to Pharaoh because they were under covenant to a different God who was in the process of bringing Pharaoh and his society under judgment. See chapter 4.

21. Chapter 23.

22. Gary North, *Boundaries and Dominion: An Economic Commentary on Leviticus*, 2nd ed. (Dallas, Georgia: Point Five Press, [1994] 2012), ch. 7.

at the granary or the owner of the house opened the storage-room and took grain or he has denied completely (the receipt of) the grain which was stored in his house, the owner of the grain shall set forth the particulars regarding his grain in the presence of god and the owner of the house shall give to the owner of the grain double the grain that he took."[23] The one who was said to have stored the grain was assumed to be guilty, once the accuser had made an oath in the presence of a god. Whether theft was involved or simply negligence, the granary owner paid double. But this was not a case of voluntary safekeeping. This was a commercial transaction. The law imposed a fixed price for storing grain.[24]

The Code of Hammurabi did not rely exclusively on an oath before a god in every case. It also relied on written contracts and witnesses. There is no reason to believe that this was not also true in ancient Israel. But in an illiterate culture, not everyone can afford such written documents. The Code of Hammurabi was almost entirely concerned with laws governing the oligarchy. This was not the case with biblical law. Thus, Old Testament rules of evidence were based on verbal promises and oaths, because it set down general laws that governed all people in Israel. Anyone who wished to have someone else store silver, gold, or anything else for safekeeping had to show witnesses what was being entrusted to another. Contracts were drawn up.[25] "If he gave (it) for safekeeping without witnesses and contracts and they have denied (its receipt) to him at the place where he made the deposit, that case is not subject to claim."[26] On the other hand, if there were witnesses, the person who accepted the property for safekeeping paid the depositor double.[27] There is no reason to doubt that the same sorts of evidence could be used in a Hebrew law court, but the case law does not mention types of formal evidence.

If the safekeeper's house was broken into, and both his property and the depositor's stored property were missing, he was presumed by law to be careless. The law declares: he "shall make (it) good and make restitution to the owner of the goods, while the owner of the house shall make a thorough search for his lost property and take (it)

23. Hammurabi Code, paragraph 120. *Ancient Near Eastern Texts Relating to the Old Testament*, ed. James B. Pritchard, 3rd ed. (Princeton, New Jersey: Princeton University Press, 1969), p. 171.

24. *Ibid.*, paragraph 121.

25. *Ibid.*, paragraph 122.

26. *Ibid.*, paragraph 123.

27. *Ibid.*, paragraph 124.

from its thief."[28] First, the language indicates that the safekeeper did not pay double, but only restored what was lost, making good the loss. This corresponds to the provision of Exodus 22:12: "And if it be surely stolen from him, he shall make restitution unto the owner thereof." Second, this law indicates that any property subsequently returned by the thief to the safekeeper who had paid restitution to his neighbor would be kept by him as compensation for his loss.

The most interesting section of the Code refers to a man who claimed that his property was lost, when it was not lost. The law says that he has deceived the city council. The council set forth the facts of the case "in the presence of god," and he then paid double restitution to the city council, not to the person who was falsely accused.[29] This is in stark contrast to biblical law, which makes the false accuser liable for damages he sought to impose on a private party. It is much closer to modern concepts of jurisprudence, where fines are paid to the state.

The other major difference between Hammurabi's Code and the Bible is that these laws applied only to aristocrats. Nothing is said about the legal relations between aristocrats and commoners. The law protected aristocrats in their relations with each other, but no legal protection was guaranteed for other classes.

3. Escaping an Erroneous Accusation

Once the accuser has made his accusation, the accused has a lawful way of escape: the oath.[30] "Then shall an oath of the Lord be between them both, that he hath not put his hand unto his neighbour's goods; and the owner of it shall accept thereof, and he shall not make it good" (Ex. 22:11). If the accused takes this oath, the court must declare him innocent. But if he refuses, the court can lawfully declare him guilty. The accused is legally obligated to take the oath.[31] As we

28. *Ibid.*, paragraph 125.

29. *Ibid.*, paragraph 126.

30. Boecker made the observation that oaths were taken only by the accused in Israel's courts. There is no case in the Bible that an oath was taken by a witness, he says. Hans Jochen Boecker, *Law and the Administration of Justice in the Old Testament and Ancient East*, trans. Jeremy Moiser (Minneapolis, Minnesota: Augsburg, [1976] 1980), p. 35. This seems to be true with respect to formal oath-taking, but Boecker's observation is also irrelevant. The witness who gave his testimony in a Hebrew court was implicitly under an oath, for he was under the threat of civil covenant sanctions. Perjury on the part of the witness, when discovered and proven, subjected the lying witness to the punishment that would have been imposed on the victim (Deut. 19:15–21). Where there are covenant sanctions, there is inevitably a covenant oath, either implicit or explicit.

31. The Fifth Amendment of the United States Constitution prohibits the federal government from forcing an individual to testify in court against himself in a criminal

shall see, added economic penalties were imposed by the civil magistrates and also by ecclesiastical officers on a man who offered false testimony under oath.

Hirsch argued that the double restitution penalty is to be imposed only after the thief has sworn falsely.[32] I disagree. Once the trial has begun, the convicted thief owes double restitution, with or without the oath. Only if he confesses before the trial can he escape double restitution, in which case he pays to the victim full value restitution plus 20%.[33] It is not simply that theft is to be penalized; false oaths must also be penalized. The Book of Leviticus specifies that a trespass offering to God must be made by anyone who makes a false oath. The Old Testament trespass offerings for swearing falsely (Lev. 5:4) involved ritual animals: lambs, turtledoves, or pigeons (Lev. 5:6–7). The priest made atonement for the guilty person (Lev. 5:6).

In New Testament times, such ritual atonement offerings have not been applicable (Heb. 9). This does not mean that there are no valid penalties against false oaths. A payment must go to the church as a means of restitution to God (Lev. 6:6). This also reminds the civil court that it is not the only valid court in society. The church, as God's representative court over the individual's moral conscience, is entitled to a payment, although the civil judges are to specify the size of this payment. "And he shall bring his trespass offering unto the LORD, a ram without blemish out of the flock, *with thy estimation*, for a trespass offering, unto the priest" (Lev. 6:6).

E. Confession and Restitution

I argue in this commentary that once a person commits a theft, he automatically owes the victim at least a 20% payment in addition to the return of his principal. The case does not have to come to trial for

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case. This provision is clearly opposed to the requirement of biblical law that a person swear before God that he is innocent: he may not remain silent. Until the ratification of the Fourteenth Amendment in 1868, the first eight amendments did not apply to the states. Chief Justice John Marshall articulated this position in his famous decision, *Barron v. Baltimore* (1833). See *The Constitution of the United States of America: Analysis and Interpretation*, Congressional Research Service, Library of Congress (Washington, D.C.: Government Printing Office, 1973), pp. 889–90. The Committee of Eleven, to whom the Bill of Rights (first 10 amendments) had been referred by Congress in 1789, rejected any suggestion that these amendments be applied to state governments as well as to the federal government: Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, Massachusetts: Harvard University Press, 1977), p. 134n.

32. Hirsch, *Exodus*, p. 349.

33. Chapter 47.

this penalty payment to be owed by the thief. I derive this conclusion from the case law's texts regarding theft, but also from the example of the archetypal theft: Adam and Eve's stealing of God's forbidden fruit.

1. Adam's Trial

The moment they touched it, they were guilty. They owed God at least a ritual apology. In the Old Testament, anyone who touched a forbidden (unclean) thing was himself unclean until evening (Lev. 11:24–25). I think this was because God had originally returned in judgment to the garden in the cool of the day" (Gen. 3:8), meaning at evening. It may not have hurt God's net asset value for them to have merely touched the fruit, but it was a violation of His law, His ethical boundary.

They went beyond mere touching; they stole the fruit and ate it. This was theft. It was corrupt caretaking. It was also the equivalent of eating a forbidden sacrifice, for it was a ritual meal eaten in the presence of the serpent. The penalty for this in ancient Israel was separation from God's people: "But the soul that eateth of the flesh of the sacrifice of peace offerings, that pertain unto the Lord, having his uncleanness upon him, even that soul shall be cut off from his people. Moreover the soul that shall touch any unclean thing, as the uncleanness of man, or any unclean beast, or any abominable unclean thing, and eat of the flesh of the sacrifice of peace offerings, which pertain unto the Lord, even that soul shall be cut off from his people" (Lev. 7:20–21). This penalty pointed back to the garden, where God separated Adam and Eve from Himself by casting them out of the garden.

God, however, is merciful to sinners. Why else would He have created the sacrificial system? Thus, had Adam and Eve come to God as He entered the garden, admitting their sin and pleading for mercy, He would have spared mankind the ultimate penalty of eternal separation from Him. In fact, had they prayed a prayer of confession rather than spending their time sewing fig leaves for themselves, they would have escaped the death penalty—full restitution payment to God. This very act would have constituted a pre-trial confession of guilt. It would have been an act of symbolic communion with God—a judicial, sanctions-governed act of repentance. But instead they tried to cover their own guilt through their own efforts: sewing fig leaves. God therefore announced His sentence of death against them: dust to dust. Those who wait until the end of the trial must make full (multiple) restitution.

My conclusion is that a pre-trial confession of guilt by the criminal is punished less rigorously than a crime in which the criminal is convicted on the basis of the judges' inquiry. A person is always encouraged by God to confess his sins. If these sins are public sins, then his confession must also be public, if not to a court, then at least to the victim. For example, if a worker steals cash from his employer, but later replaces it before the theft is discovered, he still must confess his crime to the owner. The fact that no human being detected the crime does not affect the question of guilt and sanctions in God's eyes. The thief did impose the *risk* of permanent loss on the victim, even though the victim suffered no known loss; the victim therefore deserves compensation. This upholds the biblical principle of victim's rights. The victim, like God, should strive to be merciful, but biblical law teaches that he is entitled to be informed that mercy is now in order.

2. Leviticus 6

Biblical law subsidizes public confession. If a man confesses, he can escape the multiple restitution requirement: he is required only to repay the stolen principal, plus 20%.

> If a soul sin, and commit a trespass against the LORD, and lie unto his neighbour in that which was delivered him to keep, or in fellowship, or in a thing taken away by violence, or hath deceived his neighbour; or have found that which was lost, and lieth concerning it, and sweareth falsely; in any of all these that a man doeth, sinning therein: Then it shall be, because he hath sinned, and is guilty, that he shall restore that which he took violently away, or the thing which he hath deceitfully gotten, or that which was delivered him to keep, or the lost thing which he found, or all that about which he hath sworn falsely; he shall even restore it in the principal, and shall add the fifth part more thereto, and give it unto him to whom it appertaineth, in the day of his trespass offering (Lev. 6:2–5).[34]

There appears to be an inconsistency here. The penalty for theft is here stated to be 20%, yet in other verses, restitution for theft in general is two-fold, and sometimes four-fold or five-fold. Why the apparent discrepancy? We know that Leviticus 6 is dealing with cases in which the guilty person has sworn falsely to the authorities. Later, however, he voluntarily confesses the crime and his false oath. I conclude that the double restitution penalty is imposed only in cases where a formal trial has begun. The provision in Leviticus 6 of a reduced penalty is an economic incentive for a guilty person to confess

34. North, *Boundaries and Dominion*, ch. 7.

his crime before the trial has begun, or at least before the court hands down its decision.

The thief has testified falsely to the authorities, either before the trial or during it. This is why he owes a trespass offering to the priest (Lev. 5:1–13; 6:6). I argue here that he can lawfully escape the obligation to pay double restitution if he confesses after his initial denial, but before the trial begins. He cannot lawfully escape paying double restitution and making the trespass offering if he swears falsely during the trial. He has to confess before the oath is imposed and the trial begins.

As always, we should search for a theocentric principle lying behind the law. There is one in this case: the correlation between this *reduced criminal penalty* for voluntary, public confession of sin, when accompanied by economic restitution, and God's offer of a *reduced (eliminated) eternal penalty* for people who make public Christian confession of sin prior to their physical death, if this confession is also accompanied by economic or other kinds of restitution.[35] If we wait for God's formal trial at the throne of judgment, we are assured of being forced to pay a far higher restitution penalty.

Why do I believe that Leviticus 6 refers to a pre-trial voluntary confession? Because of the context of Leviticus 6. Leviticus 5 deals with sins against God that must be voluntarily confessed: "And it shall be, when he shall be guilty in one of these things, that he shall confess that he hath sinned in that thing" (Lev. 5:5). The sinner in Israel then brought a trespass offering to the priest (Lev. 5:8). This made atonement for the trespass: "And he shall offer the second for a burnt offering, according to the manner: and the priest shall make an atonement for him for his sin which he hath sinned, and it shall be forgiven him" (Lev. 5:10). Why would he make such a public confession? Because of his fear of the ultimate penalty that God will impose on those who offer false testimony in His courts.

We then note that Leviticus 6 also deals with trespasses against God. It is specifically stated in Leviticus 6:2 that the 20% penalty payment applies to "a trespass against the Lord" in which the sinning individ-

35. I am not arguing that salvation is by works. It is by grace (Eph. 2:8–9). But let us not forget Ephesians 2:10: "For we are his workmanship, created in Christ Jesus unto good works, which God hath before ordained that we should walk in them." I am arguing that without obedience, our faith is dead. James 2:18 says: "Yea, a man may say, Thou hast faith, and I have works: shew me thy faith without thy works, and I will shew thee my faith by my works." And in James 2:20, we read: "But wilt thou know, O vain man, that faith without works is dead?" The outward obedience of the criminal is supposed to be demonstrated by his willingness to make restitution to his victim.

ual has lied to his neighbor about anything that was delivered to him by the neighbor for safekeeping. The context indicates that the sinner has voluntarily confessed his crime against God and his neighbor, just as he voluntarily confessed his trespass against God in Leviticus 5.

The question is inevitable: Are there two penalties of 20% implied in Leviticus 6, or only one? In other words, is there a 20% penalty only for making a false oath, with the payment going to the victim, and with a trespass offering also going to the church court, or is there also a 20% penalty to the victim in cases of pre-trial confession?

3. Restitution Plus a Trespass Offering

Here is the problem the commentator faces. The text in Exodus 22 states that the court is to require double restitution from the neighbor who has "put his hands to" his neighbor's goods. He is therefore to be treated as a common thief. But if double restitution is the required penalty, then what is the 20% penalty of Leviticus 6:5 all about?

It has been argued by some Jewish commentators that the 20% penalty in Leviticus 6:5 is to be imposed only in cases where there has been a public oath before a rabbinical court. They argue that the penalty payment does not apply to cases of voluntarily confessed theft as such, meaning secret or even undetected thefts, but only to cases of forcible robbery in which the thief is identified, arrested, and brought before an *ecclesiastical* (i.e. synagogue) court, where he gives a false oath of denial, and later admits this lie. Wrote Jacob Milgrom: "Since the point of this law is to list only those cases that culminate in the possessor's false oath, it would therefore be pointless to include the term 'theft' which assumes that the possessor-thief is unknown."[36] He went so far as to argue that the Leviticus passage deals only with religious law, not civil law. "All that matters to the priestly legislator is to enumerate those situations whereby the defrauding of man leads, by a false oath, to the 'defrauding' of God. The general category of theft in which the thief remains unidentifiable is therefore irrelevant to his purpose."[37] Eight centuries earlier, Maimonides wrote that the thief who confesses of his own accord owes only the value of the asset he stole, not double restitution. He did not mention the 20% penalty.[38]

36. Jacob Milgrom, *Cult and Conscience: The "Asham" and the Priestly Doctrine of Repentance* (Leiden: E. J. Brill, 1976), p. 100.

37. *Ibid.*, pp. 100–1.

38. Moses Maimonides, *The Book of Torts*, vol. 11 of *The Code of Maimonides*, 14 vols. (New Haven, Connecticut: Yale University Press, [1180] 1954), "Laws Concerning Theft," II:I:5, pp. 60–61.

If Milgrom's view were correct, this would mean that there would be no court-imposed restitution penalty payment from criminals to victims in (oathless) cases of pre-trial, self-confessed theft. Why wouldn't there be such compensation? Because the one-fifth penalty was assumed by Milgrom to be applicable only in cases where there has been a false oath. This interpretation therefore eliminates the 20% penalty payment for pre-trial, self-confessed crimes.

While this judicial implication follows the premise, it is not in accord with the biblical principle of victim's rights. The victim has been deprived of his property, and he has suffered a sense of loss, assuming that he had actually discovered that the stolen item was missing, yet the Bible supposedly makes no provision to compensate him for these obvious burdens. On the face of it, this conclusion seems highly unlikely, yet it follows inevitably from the initial claim that the 20% penalty only applies to cases where there has been a false oath to a court.

Why do I believe that this interpretation is unlikely? Because the Bible is emphatic that *victims are to be protected*, and that *criminals are to suffer losses in proportion to their crimes*. The thief who confesses before a trial is not on a par judicially with a neighbor who has, through negligence, lost or inadvertently ruined an item placed in his safekeeping. The negligent neighbor pays only for what he lost; the self-confessed thief has to pay more. The principle of *lex talionis* applies here as elsewhere: the penalty must fit the crime.[39] To argue that the penalty is the same for theft and negligence—merely the return of the stolen item or its equivalent value—is to deny *lex talionis*.

If thieves were granted the legal option of returning stolen goods whenever it appeared to them that they might be discovered, but before they are put under oath, then it would be far less risky to steal. If there is a 20% penalty only after a false oath is given, but before a trial, then a theft that is confessed before the oath is administered would become virtually risk-free for the thief. He could escape any penalty simply by confessing his crime and by returning the stolen property. The option of self-confession would remain as an escape device whenever the authorities began to close in. If God's law did not impose penalties on theft, it would implicitly be subsidizing criminal behavior. God does not subsidize rebellion.

The express language of the passage militates against Milgrom's interpretation of Leviticus 6. After listing all sorts of theft and decep-

39. Chapter 41.

tion, the text says, "he shall even restore it in the principal, and shall add the fifth part more thereto" (v. 5). To whom must this penalty payment be paid? To the victim: "Or all that about which he hath *sworn falsely*; he shall even restore it in the principal, and shall add the fifth part more thereto, and *give it unto him to whom it appertaineth*, in the day of his trespass offering" (Lev. 6:5b). While the passage does mention a false oath, this does not render null and void a penalty for each of the crimes that preceded verse 5.

The sense of the passage is not that a false oath must accompany each of the list of transgressions in order for the penalty to be invoked. On the contrary, *each of the victims of these crimes is to be compensated by a 20% penalty payment*. The crimes are separate acts; thus, translators used the English word "or" in listing them, indicating that any one of these criminal infractions automatically invokes the 20% penalty, not merely the taking of a false oath. The false oath invokes its own independent penalty payment: the trespass offering, a ram without blemish (Lev. 6:6). So, the criminal must pay the victim 20%, with or without a false oath. The false oath makes the trespass offering to the priest an additional requirement.

Leviticus 6 is not in opposition to Exodus 22:9. Exodus 22:9 requires double restitution either from the false accuser who perjured himself (Deut. 19:16–19) or from the criminal neighbor (thief). Assume that the criminal neighbor swears falsely before the judges in order to avoid having to pay double restitution to his victim. If successful in his deception, he escapes the penalty. But what if the accuser is convicted of making a false accusation? The lying neighbor collects double restitution from the victim. He now owes him fourfold restitution. What if he then repents of his false oath before it is discovered? He still owes the original double restitution, plus the return of the falsely collected double penalty, plus a 20% penalty payment on everything (Lev. 6:1–6). Thus, if the stolen object was worth one ounce of gold, the restitution payment owed to the victim by a now-confessed perjured thief would be 4.8 ounces of gold: 2 ounces (the original double restitution payment), plus 2 ounces (the falsely extracted penalty) plus .2 times 4 ounces, meaning .8 ounces = 4.8 ounces.

What about the perjured thief who refuses to admit his guilt and who is later convicted of this perjury? Because he had been paid double restitution by his victim (Ex. 22:9), he now owes him *six-fold restitution*: double whatever he had stolen (2 × 1) plus double whatever

he had unlawfully collected (2 × 2). This threat of six-fold restitution serves as an economic incentive for the perjured thief to confess to the court that he had offered false testimony earlier. We see once again that *biblical law rewards timely confession*.

Exodus 22:9 establishes double restitution for stolen sheep and oxen, not four-fold or five-fold. This is because neighbors are involved. What if the court does not have proof that the accuser testified falsely against his neighbor, yet also does not have sufficient proof to convict the neighbor? The thieving neighbor escapes paying two-fold restitution. What if he then repents and confesses? He owes his neighbor a 2.4 restitution penalty (2 × 1, plus 2 × .2). What if his crime is discovered later? He owes four-fold restitution for perjury: double what he would have owed if he had been convicted originally.

What would he have owed to the temple in the case of unconfessed perjury? If the trespass offering was one animal if he had confessed after having made a false oath or oaths, presumably the penalty was double this.[40] This follows from my thesis that *there is an escalation of penalties*. At each step of the legal proceedings, he can confess and bear a reduced penalty. For each level of deception, there are increased sanctions.

God is honored by the very act of self-confession, when such confession has a penalty attached to it. Oath or no oath, the two primary goals of laws governing theft are the *protection of property* and the *compensation of the victim*. Earthly civil courts are therefore to safeguard the property rights of the victims, making sure that the appropriate penalty is extracted from the criminal and transferred to the victim. There is no requirement of an additional money penalty payment to the civil court because of a false oath regarding theft. A trespass or guilt offering must be paid to the church.[41]

The false oath before God invokes the threat of the ultimate penalty: the eternal wrath of God, preceded by the physical death of the criminal. Unless a person confesses his false oath in this life, makes appropriate restitution to his victim and brings a transgression offering, God will collect His own restitution payment, and it is far greater than 20%. Ananias and Sapphira lied to church authorities concern-

40. It could be argued that the penalty was death: a high-handed false oath that was not confessed.

41. The question arises: Which church? To the church that the convicted thief belongs to, since it suffers the public humiliation. If he belongs to no church, then it should probably go to the victim's church, or if he also does not belong to a church, to a local church selected randomly or in predictable sequence by the civil judges.

ing the percentage of their economic gains that they had voluntarily donated to the church. When asked individually by Peter if what they had told the authorities was true, they lied, and God struck each of them dead on the spot, one by one (Acts 5:1–10). This served as a very effective warning to the church in general (v. 11). Presumably, they could have confessed their crime at that point, paying all the money from the sale into the church's treasury, because God was the intended victim of their lies (Acts 5:4). They chose instead to lie. So, God imposed His more rigorous penalty.[42]

4. After the Accusation, but Before the Trial

What if the thief stole an animal, especially a sheep or an ox, and then sold it? If the civil authorities have brought the thief to trial, but the trial has not been held, would he be given the opportunity to confess to the victim, and then go to the buyer, confess his crime, buy it back at the purchase price plus 20%, and return it to the true owner, plus 20%? This would seem to be a reasonable conclusion. His confession would reduce the cost of prosecuting him and convicting him. Understand, however, that the thief has committed two crimes: the original theft and the defrauding of the buyer. The buyer was led to believe that the thief possessed the legal right of ownership, which was being passed to the new buyer.[43] Thus, the defrauded buyer is also entitled to a 20% penalty payment, as well as the return of his purchase price. This would make the total penalty 40%, because he had defrauded two people: the first by means of the theft and the second by means of his lie.

The thief's confession reduces the possibility that a guilty man will go free and an innocent victim will be defrauded. Apart from this admission, the judges might make a mistake, especially if the thief commits perjury during the trial. His confession eliminates this judicial problem.

The modern judicial system has adopted an analogous solution: plea bargaining. A criminal confessses falsely to having committed a lesser crime, and the judge accepts this admission and hands down a reduced penalty. This is the way that prosecuting attorneys unclog the court system. The Bible rejects this approach. Plea bargaining leaves the main crime officially unsolved, and it allows the guilty person to

42. Gary North, *Sacrifice and Dominion: An Economic Commentary on Acts*, 2nd ed. (Dallas, Georgia: Point Five Press, [2000] 2012), ch. 5.

43. Chapter 43:C.

appear less of a threat to society than his behavior indicates that he is. The Bible does recognize the institutional problem, however: the risks and costs of gaining a conviction. Instead of having the criminal plead guilty to a lesser crime, it encourages him to plead guilty to the actual crime before the trial, and thereby receive a reduced penalty.

F. Who Pays What?

The judges must determine the nature of the negligence, and therefore the size of the restitution payment. A thief pays double (v. 7). If the neighbor is the thief, he pays double (v. 9). But verse 12 speaks of "restitution," not a double payment: "And if it shall be stolen from him, he shall make restitution unto the owner thereof." In this case, "restitution" means "making good the loss." We can see this in verse 13, where it says that when he can produce the torn remains of the animal, "he shall not make it good." "Making it good" and "restitution" are identical words in Hebrew, and should be regarded as equivalents here.

Restitution in the context of the obligation of the negligent safekeeper is *a payment equal to the value of what had been lost*. The responsible neighbor did not intend to profit from the theft. Indeed, he voluntarily took on added responsibilities by agreeing to serve as a protector. Negligence on the part of the safekeeper is not the same as criminal intent on the part of the thief; therefore, the penalties are different. The thief pays the victim an extra penalty equal to his hoped-for profit: double restitution. There is no additional penalty payment imposed on the safekeeper, for he had not hoped to profit by the transaction. To make safekeepers responsible for large restitution payments associated with criminal action would be to break down the covenantal bonds of the community, because too high a risk factor would be transferred to safekeepers. Men would no longer be so willing voluntarily to accept the liabilities of safekeeping. This reduction in voluntary safekeeping activities would tend to subsidize the criminal class, which is certainly not the intent of biblical law.

The "hospitality of safekeeping" is designed to make theft more difficult for professional thieves. Clearly, it makes theft easier for previously honest neighbors. Nevertheless, the law has been given by God. So, the focus of judicial concern has to be on the professional thief. A man delivers his inanimate goods to a neighbor, above all, to keep them from being stolen. The recipient therefore must take care to see to it that the property is not stolen. He cannot guard against ev-

ery conceivable loss, but he is required to make life more difficult for thieves. The law makes this responsibility inescapably clear: "And if it be stolen from him, he shall make restitution unto the owner thereof" (v. 12). The safekeeper has to repay the depositor. This motivates the safekeeper to seek to capture the thief.

If subsequently apprehended and convicted, the thief must pay the victimized safekeeper double. The safekeeper has already had to repay the depositor. It should be obvious that if the safekeeping neighbor has been assessed a compensating restitution payment, he has "bought" the missing beast from the original owner. Therefore, half of what the thief has returned to him serves as compensation for the loss he incurred by repaying the depositor. The other half of the double restitution payment is his compensation for having been put into a bind by the thief's actions.

The principle of ownership does not change in the case of the stolen ox or sheep. If the thief had stolen and killed or sold a sheep or an ox, and therefore must make a five-fold or four-fold restitution payment, the safekeeper receives the total restitution payment. He has become the victim, not the original owner, who has been compensated by the safekeeper; therefore, the safekeeper should receive the four-fold or five-fold restitution payment.

Conclusion

Accepting the responsibilities associated with safekeeping is a voluntary act that affirms the existence of covenantal bonds. There are judicial bonds with the neighbor, with the community, and with God. By acting as a steward of another man's property, the safekeeper becomes an agent of the neighbor, the community, and God. He must do his best to keep thieves at bay. He is not responsible for every possible loss that might befall these entrusted goods, but he is responsible to see that thieves do not break in and take them. He is responsible up to the value of the stolen goods, beast for beast, good for good.

The neighbor who is a thief jeopardizes covenantal social order. He is to be brought before the judges by the victim. This passage refers exclusively to criminal behavior. This is why double restitution is imposed in each case. Double restitution is biblical law's sanction against criminal intent: an additional restitution payment is imposed that is equal to the gross return that the thief hoped to gain from the transgression. If the case comes to trial, the accused must take an oath before God and the court that he is innocent. The thief takes

great risks in giving a false oath. A false oath involves him in a second theft: the attempt to avoid paying the victim his lawful restitution. If he later admits his false oath, he will have to make an additional payment of 20% of the required double restitution to the victim, plus a trespass offering to the church. If he never admits it, and his false oath is subsequently proven in court, he will have to make quadruple restitution to the victim, or six-fold restitution, plus at least a double trespass offering to the church.